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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 555 15

PETER CASELLA,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Peter Casella, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on October 2, 1959.

OPINION BELOW.

The opinion of the court below has not been officially reported. It is here separately presented.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 2, 1959 (Appendix A). A petition for rehearing was denied November 2, 1959 (Appendix B). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I. Where there is no evidence offered to show that narcotics had been illegally imported into the United States nor that the petitioner knew them to be illegally imported, and where the Government's evidence shows that petitioner had never been in physical possession of the narcotics, can petitioner's convictions be sustained by invoking the presumption of guilt set forth in 21 U. S. C. § 174, which is applicable only under proof of possession, where the evidence shows only that petitioner conspired with other defendants who were in possession of the narcotics?

II. Where petitioner was convicted on three substantive counts as well as a conspiracy count contained in one indictment, and where the substantive offenses constituted the basis of the conspiracy, did the imposition of maximum sentences on all four counts, some of which are to run consecutively, constitute an improper accumulation of sentences?

III. Was petitioner deprived of a fair trial in the setting of this case, where the Trial Judge, sitting without a jury, threatened to impose heavy sentences if the trial lasted beyond a certain date, and where the trial did last beyond that date, and petitioner, a first narcotics law offender, received maximum sentences on all counts?

STATUTES INVOLVED.

21 U. S. C. § 173 provides as follows:

> "§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control

or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin."

21 U. S. C. § 174 provides as follows:

"§ 174. Same; penalty; evidence.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF THE CASE.

Petitioner Casella was convicted on four counts in a five count indictment after a trial before a District Court sitting without a jury. Counts 1, 2 and 3 charged petitioner and others with unlawfully, wilfully and knowingly receiving, concealing, buying, selling, and facilitating the transportation, concealment and sale of narcotics after the said narcotics had been imported into the United States contrary to law, and knowing of such importation, in violation of Sections 173 and 174 of Title 21 of the U. S. Code. Each of those counts related to separate transactions. Count 1 concerned the delivery of heroin on October 21, 1957; count 2 concerned the delivery of heroin on December 11, 1957, and count 3 concerned the delivery of smoking opium on December 19, 1957. Count 5 charged the petitioner and several others, including the other defendants named in the first three counts, with conspiring to violate the above sections by unlawfully, wilfully and knowingly receiving, concealing, buying, selling, and facilitating the transportation, concealment or sale of narcotics after the narcotics had been imported into the United States contrary to law, knowing that the narcotics had been so imported. The indictment also listed thirty-two overt acts, including those constituting the substantive offenses charged in the first three counts, alleged to have been undertaken in pursuance of the conspiracy charged in count 5.

The Government's case was based on the testimony of narcotics agents, two of whom, Agents Marshall and Picini, introduced themselves under assumed names to defendant Santore in Philadelphia on February 26, 1957, expressing an interest in purchasing narcotics for purposes of resale (13a). They testified that after several months during which they made purchases of narcotics through Santore from Malfi and Valli (neither of whom were named in this indictment and none of which transactions were involved in this case and all of which occurred prior to the date on

which the conspiracy charged in count 5 was alleged to have begun), they eventually prevailed on Santore to introduce them to his New York "connection." Santore finally offered to make the introduction in return for $2,000.

On October 16, 1957, Santore introduced the agents to petitioner Casella, at which time they discussed the purchase of narcotics (15a). Four deliveries of narcotics were made to the agents before all of the defendants were arrested.

On October 21, 1957 a quantity of heroin was delivered by Santore to Agent Marshall, who placed a package in the trunk of Marshall's car in New York. There was no evidence that the petitioner Casella was in the vicinity at the time of delivery (17a-18a). Agent Marshall informed Santore that he was unable to pay for the narcotics because Picini, who had the funds, was in a Trenton hospital. This story was repeated to Casella later, who finally agreed that Marshall could keep the drugs on consignment if Casella's "New York partners" consented. Casella later met several of the other defendants, held a discussion, and later returned to Marshall and Santore. He told them that he had convinced the others that Marshall could keep the package, but that full payment must be made by October 23, 1957 (17a-19a).

During the month of November, 1957, the agents, Santore and Casella discussed sales of opium, but nothing came of the discussions. The agents testified that Casella stated that this opium was "the best smoking opium available, was supposed to come from Turkey and was called red Turkey smoking opium" (21a).

After further discussions, on December 11, 1957, Casella obtained from Agent Picini a key to the agents' room in the Hotel Edison, after which Casella and Agent Marshall drove to an apartment building on 69th Street, in which defendant LoPiccolo had an apartment. Casella left the car and returned within fifteen or twenty minutes. The agent testified that Casella told him he had delivered the

key to his sources and delivery would be made that night. That evening all four of them went to the agents' room and saw that the appointed drawer was empty. They adjourned to the lobby, where they waited for approximately fifteen minutes when Casella instructed the agents to go to the room. Agent Marshall went to the room and found in that drawer a package, later identified as containing heroin (23a-25a, 37a-39a).

On December 19, 1957, Casella, Santore and the two agents drove to the apartment building on 69th Street, where Casella and Santore left the car and entered the apartment building. Shortly thereafter, Santore returned to the car and gave a package to Agent Marshall, which was later identified as containing smoking opium (26a-27a).

On January 23, 1958, Santore delivered a quantity of heroin to Agents Marshall and Picini in the King Cole Motel in New Jersey. This delivery is not involved here. Immediately after the delivery, on a signal from agents Marshall and Picini, other agents came in and placed Santore under arrest. Casella was nowhere in the vicinity (29a-30a, 43a).

These transactions resulted in indictments of the various participants in New Jersey, Brooklyn and New York. Petitioner was tried in the District Court of New Jersey and the Southern District of New York. On July 3, 1958, the District Judge for the Southern District of New York found all of the defendants, including petitioner Casella, guilty on all counts, and on July 31, 1958, sentenced petitioner Casella as follows:

> "I will sentence him on Counts 1 and 2 to 20 years, and on Counts 3 and 5—the sentences on Counts 1 and 2, 20 years on each, but concurrently with each other. The sentence on Counts 3 and 5 is also 20 years each, and I will make that concurrent with each other, but consecutively to the sentence on Counts 1 and 2, so that the total sentence will be 40 years, and I will say this in front of Mr. Casella, that if he wishes he may.

make an application to reduce the sentence, provided proof is shown me that he is making a genuine effort to cooperate, and he knows what I mean by that.

"You can save yourself a lifetime in jail, Mr. Casella, but the only one who can help you now is yourself" (77a).

Subsequently, petitioner Casella was convicted on four counts of an indictment in the District Court of New Jersey, and was sentenced to a total term of twenty-five years, to be served concurrently with the first twenty-five years of the total sentence imposed by Judge Noonan. A petition for certiorari has been filed in this Court in that case, *Casella, Petitioner, v. United States of America*, October Term, 1959, No. 521.

REASONS FOR GRANTING THE WRIT.

The issues involved in this case are so troublesome that a panel of such distinguished jurists as Circuit Judges Learned Hand and Waterman, and District Judge Byers, differed widely in their conclusions, and the issues are so important and recurring in Federal criminal law and the enforcement of narcotics laws, that this Court should review petitioner's convictions.

I.

Petitioner was charged in three substantive counts with dealing in narcotics illegally imported and which he knew to be illegally imported. Yet not one word of evidence was offered to show that the narcotics were imported illegally nor that he knew them to be so.[1]

The Government tried its case solely on the theory that the physical possession of one conspirator is sufficient

1. There is a statement by petitioner interpreted by the Court of Appeals to show knowledge as to the source of opium involved in Count 3 only.

to charge all who participate in the conspiracy with possession of the narcotics and that, therefore the statutory presumption of guilt applies against all conspirators, even against one not in possession. However, as to count 3 the Court of Appeals affirmed petitioner's conviction on the assumption that there was sufficient evidence to support the finding that the opium was illegally imported and that Casella knew it, because of his statement that the opium was called red Turkey and was of the best quality, just as it came off the boat, and was in port but not yet unloaded. It is respectfully submitted that the Court of Appeals misinterpreted the evidence. The agents testified[2] that on November 7, 1957, Casella told them "this opium was the best smoking opium available, was supposed to come from Turkey and was called red Turkey smoking opium" (21a, 34a). They also testified that Casella told them "he could supply us with anywhere from a half a kilo to a ton of pure, and that we would get it just as it came off the boat" (32a) and that Casella "reiterated that we should take the five kilos and that the heroin—the opium would not be in—was in port, but it had not been unloaded there, and that as soon as they had gotten it, then we would get a sample of it" (38a). It is respectfully submitted that none of those statements are evidence of knowledge of the source of the opium but are mere "puffing" concerning the quality.

On the other hand, the Court of Appeals recognized that as to counts 1 and 2 there was no evidence in the case that the heroin was illegally imported or that petitioner knew it to be contraband. The Court of Appeals reviewed all of the convictions and set forth a new and remarkable test as to what constitutes possession within the meaning of the narcotics statutes involved.

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2. The agents' version of Casella's statement differed slightly, but neither quoted Casella as stating categorically that the opium did come from Turkey, merely that it was *supposed* to come from Turkey (compare Marshall's version, 21a, with Picini's version, 34a).

As to petitioner Casella, the majority opinion of the Court of Appeals concluded that personal custody or manual possession of narcotics is not essential to bring the presumption into operation against him. The majority admitted that the authority for this novel doctrine is not conclusive and could be classified as dictum. The majority opinion concludes that although Casella was not in sole control of the heroin, he was a full partner in the conspiracy, not simply a hired agent, and that he had at least partial control over what was to be done with the contraband handled by the group, and concluded from this that he could be charged with the presumption arising from the possession of another.

Thus, the majority opinion stretches the plain meaning of the statute far beyond its intent. As noted by Judge Learned Hand (dissenting as to the application of this doctrine to two other defendants in the case but not to petitioner), the statute does not use the words "possession or control" as Congress did in other statutes. Furthermore, the majority sustains petitioner's conviction on the substantive counts solely on proof that petitioner was part of a conspiracy, of which petitioner was also convicted, and for which he received separate consecutive sentences.

Thus, this case poses squarely a question never decided in this Court—the question of whether the possession of one defendant is sufficient to make the statutory presumptions arising from possession applicable to co-defendants.

This Court has recently determined that direct evidence of possession is essential to take advantage of the presumption of Section 174. *Harris v. United States*, 359 U. S. 19 (1959). In that case this Court sustained a conviction and consecutive sentence under 21 U. S. C. § 174 and 26 U. S. C. § 4704(a) arising from one transaction. There was direct proof of possession in that case. The Court used the words "direct evidence" seven times in that case in discussing the application of the presumptions arising from possession. In no case has this Court

ever sustained a conviction resting solely on a presumption based on possession of a third party.

The Courts of Appeals likewise have refused to apply presumptions without direct evidence of possession by the person charged. See *United States v. Landry*, 257 F. 2d 425 (7th Cir. 1958) (the possession of narcotics by defendant's paramour held insufficient despite defendant's confession that the narcotics were his); *Jackson v. United States*, 250 F. 2d 772 (D. C. Cir. 1957) (heroin found in T. V. set in defendant's nephew's room held insufficient even though defendant owned key to front door and room). In *Willsman v. United States*, 286 Fed. 852 (8th Cir. 1923), defendant arranged a purchase of narcotics by an undercover Federal Agent from a third person. The Court held that without evidence that the third person was defendant's agent or partner, then the possession of the third person was not sufficient to invoke the presumption. Also see *Grantello v. United States*, 3 F. 2d 117 (8th Cir. 1924) (possession of defendant's estranged wife in defendant's former residence held insufficient to invoke presumption). Compare *United States v. Wainer*, 170 F. 2d 603 (7th Cir. 1948) (the evidence that defendant arranged purchase of beer by his brother's corporation held insufficient to constitute possession of said beer, which had been stolen in interstate commerce).

If Congress wanted to achieve the result suggested by the majority opinion, it could very easily provide that the possession of one co-conspirator should give rise to the presumption. Without passing on the constitutionality of such a statute, doubt as to which is expressed by Judge Learned Hand, Congress did not so provide here.

Those cases holding that circumstantial evidence of possession is sufficient to invoke a presumption are inapposite in this case. No circumstantial evidence of physical possession or control was here offered, nor was this case tried on that theory.

It is impossible for petitioner to explain possession "to the satisfaction of the jury," as required by the statute, if he never had physical possession. Therefore application of the statutory presumption is not permissible here to support a finding of guilty.

There was no evidence, nor was the case submitted to the trier of fact, on the theory that the persons in possession of the narcotics for which petitioner Casella was convicted were agents of the petitioner. See *Amendola v. United States*, 17 F. 2d 529 (2d Cir. 1927). The position of co-conspirators is the converse of that of the master-servant relationship.

Furthermore, the Court of Appeals obviously treats control over the incidents of sale and mechanics of delivery as equivalent to control over the narcotics themselves.

While under some circumstances control may constitute possession, such control must constitute dominion over the narcotics themselves to constitute possession within the meaning of these statutes. Control over the incidents of sale and mechanics of delivery does not constitute sufficient control over the narcotics themselves to invoke the presumption. See *United States v. Landry, supra; Jackson v. United States, supra;* and *Willsman v. United States, supra.* Compare *Brown v. United States*, 222 F. 2d 293 (9th Cir. 1955) (dictum, since appellant Brown did have actual possession, handing two packets of heroin to the agent from a package he received from two women); *United States v. Hodorowicz*, 105 F. 2d 218 (1939) (involving contraband liquor).

The very concept of conspiring negates the suggestion that petitioner controlled or exercised dominion over Santore or the other conspirators, and the drugs themselves. Conspiring with others in the commission of a crime is the converse of controlling or exercising dominion over a principal. Yet this was the only theory on which the trier of fact could sustain petitioner's conviction.

Criminal statutes must be strictly construed. Where possession itself is made a criminal offense, it is essential that defendant's possession be conclusively shown. *People v. Levitt*, 301 N. Y. 113, 92 N. E. 2d 915, 917 (Ct. App. N. Y. 1950) and cases therein cited. This is of paramount importance where possession itself is made prima facie evidence of a criminal offense. As Judge Learned Hand noted:

> "As I read the paragraph, 'possession' by itself will support a conviction unless the accused 'explains the possession to the satisfaction of the jury', which in the end comes to saying that the burden of proof shifts to him to establish his innocence, once he is shown not only to be in 'possession' at the time of the forbidden dealings, but to have ever been in possession in the past. Assuming that such a statute would be constitutional which, I submit, is not wholly free from doubt, it appears to me that at least the language should be explicit that 'possession' has some other than the usual meaning. We must remember further that not only is this a criminal statute but that the penalties prescribed are extremely heavy".

Presumption cannot be constitutionally based on presumptions nor inferences on inferences. See *Rosenberg v. United States*, 120 F. 2d 935 (10th Cir. 1941); *United States v. Ross*, 92 U. S. 281 (1876); *Macket v. United States*, 90 F. 2d 462 (7th Cir. 1937).

The decision of the Court of Appeals as to the various defendants below is remarkable when the results are analyzed. The convictions of two of the conspirators (Narducci and Tarlentino) were reversed by the majority, with the concurrence of Judge Hand, even though one of those conspirators (Narducci) had narcotics in his actual physical possession, even though momentarily, and the other conspirator (Tarlentino) owned the car in which the narcotics were transported.

On the other hand, the conviction of another conspirator (Santore) was reversed as to the delivery involved in Count 2, again with the concurrence of Judge Hand, because he was not shown to have had a voice in deciding the disposition of the narcotics. (As a matter of fact, the record is completely devoid of any evidence as to who possessed the narcotics involved in Count 2. The evidence was entirely circumstantial, showing merely that the narcotics were found in the agents' room which Orlando entered some time after the key to that room had been delivered by petitioner Casella.)

The conviction of another conspirator (LoPiccolo) on that count was also reversed since there was no evidence of his control over the delivery.

Judge Hand further dissented from the convictions of two of the conspirators (Massi and D'Aria), as to whom the evidence, we submit, in terms of control was analogous to petitioner Casella. In fact, the majority notes that petitioner Casella referred to these two defendants as his "partners."

II.

Petitioner was sentenced to twenty years on each of counts 1 and 2 to run concurrently with each other, and twenty years on counts 3 and 5 to run concurrently with each other, but consecutively to the sentence on counts 1 and 2. This was the maximum sentence permissible under the statute as applied to a first offender. The sentencing judge stated, "that if petitioner Casella wishes, he may make an application to reduce the sentence provided proof is shown me that he is making a genuine effort to cooperate, and he knows what I mean by that" (77a).

It is apparent that the sentencing judge was cumulating the sentence by the mere verbal device of imposing separate sentences on substantive counts and on the conspiracy count which embraced the identical proof necessary to sustain the substantive counts. He imposed those sentences

not for legitimate purposes of punishment, but to force petitioner Casella to "cooperate," by which he apparently meant that Casella should testify concerning all he knows about the drug trafficking in which he was charged with participating.

Petitioner admits that ordinarily a defendant who is convicted of one act or a series of acts, which fall within the definition of several offenses, can be sentenced under each such statute provided the proofs required to sustain a conviction differ under each statute. *Gore v. United States*, 357 U. S. 386 (1958); *Cf. Palmero v. United States*, 112 F. 2d 922 (1st Cir. 1940). Appellant also recognized that ordinarily conspiracy is an offense distinct from a substantive crime and can be punished separately. *Parmagini v. United States*, 42 F. 2d 721 (9th Cir. 1930), *cert. denied*, 283 U. S. 818 (1931).

Yet the Second Circuit itself, speaking through Judges L. Hand, Swan and Chase, in *United States v. Mazzochi*, 75 F. 2d 497 (2d Cir. 1935), has "repeatedly expressed . . . disapproval of cumulating sentences by verbal devices. *Harrison v. United States*, (CCA) 7 F. (2d) 259; *Hartson v. United States*, (CCA) 14 F. (2d) 561; *Amendola v. United States*, (CCA) 17 F. (2d) 529; *Nash v. United States*, (CCA) 54 F. (2d) 1006."

This Court has reversed sentences imposed on seven counts of an indictment, each charging a conspiracy to violate the separate and distinct Internal Revenue Law, where the evidence showed one conspiracy to violate all the laws. *Braverman v. United States*, 317 U. S. 49 (1942). Cf. *United States v. Paiano*, 224 F. 2d 682 (2d Cir. 1955), where the Court affirmed cumulative sentences on conspiracy and substantive charges only because the trial court showed "scrupulous regard" for the rights of the defendant and the record was "wholly free from error". Also see *United States v. Hoffman*, 137 F. 2d 416 (2d Cir. 1943); *United States v. Trupuk*, 136 F. 2d 900 (2d Cir. 1943). Here it cannot be said that the trial Court showed "scrupulous

regard" for the rights of the defendant, nor that the record was "wholly free from error," as is demonstrated in Point 3 below.

III.

The record in this case was marked by one of the most shocking statements appearing in the record of any trial. On June 10, 1958, during the course of an objection by counsel for one of the other defendants, the trial judge stated:

> "The Court: I will sustain the objection. But we will be here until the end of July.
>
> "Mr. Edelbaum: It is very simple, if he asks a proper question, your Honor, without being here till the end of July.
>
> "The Court: For each day we are here after the end of June, if there is a conviction, each defendant will spend five years more."

The trial actually terminated on July 3, 1958. The sentences imposed were the maximum permissible under the statute for a first offender.

The Court of Appeals answered this contention by concluding that these remarks in context do not support a contention of prejudice and that there are no other indications of such an attitude on the part of the trial judge. However, it is respectfully submitted that even if the remark were said in jest, it is impossible to determine the effect of such a comment on other defense counsel who heard such remark. We are unable to say from this record whether or not the petitioner or other defendants were dissuaded from taking the stand because of the remark made here, whether cross-examination was curtailed, or whether any other rights to "a day in court" were jeopardized. Furthermore, this is not the only expression of this type during the course of the trial. On June 18th the trial judge remarked:

"The Court: I hope you do everything you can—and I know you will—to shorten the trial.

"Mr. Walsh: As I explained to Mr. Vitello—.

"The Court: I just want to say this. I have said this to counsel and I will say it to counsel again in open court. I have said it to all counsel inside, all at the same time, as you all know. A remark was made to me, 'Well, what have these defendants got to lose?' I say this. I am not making any promises to anybody under any circumstances, but if there were a plea of guilty or if there were a conviction, rather, here, after a trial, I would say that each of the defendants have an awful lot to lose, and if anybody thinks that just because, for instance, he got a 15-year entence to serve in some other district, that any sentence to run here would be ordered to run concurrently, he has another think coming. I am just saying that apropos of nothing in particular but, as I have said to the lawyers, if the lawyers have repeated it to the defendants and the defendants don't think that the lawyers are pulling their legs—.

"Mr. Stim: Your Honor, it is open at this time, not closed. Your Honor's mind is open at this time, not closed.

"The Court: There is no conviction forthcoming at this time, and I certainly put all the defendants in the same category, which would not be the proper thing to do, if you sat down and start to make distinctions" (75a).

Even earlier in the trial the Judge expressed his displeasure at the "waste of time," referring there to cross-examination of Agent Picini concerning payments to Casella and Santore, referring to such evidence as "nonsense" (48a-49a).

This remark occurred during a discussion of the relationship between Santore and petitioner Casella, and would have shed light upon the question of agency had the trial judge permitted further development. Yet now the conviction is sustained partly on a theory which the Court refused to permit to be developed.

Later the Court curtailed an objection by another defense counsel, with the comment, "Well, sit down. You are wasting time" (58a). At another point in the trial the Court cut off argument over one of its rulings, questioning counsel as follows: "Why argue the matter? You want to argue that I am wrong?" (R. 159).

Finally, when the Court was preparing to render its decision, counsel for one of the defendants was not present, yet when the Court was requested to wait for his arrival, it stated: "He has set forth his argument heretofore anyway, and I am quite sure there is nothing that Mr. Edelbaum could say that would change my views in any way" (R. 1827).

It is true that the judge was faced with a long trial commencing on June 3, 1958 and terminating July 3, 1958, with seventeen trial days during that period. Expedition in the handling of cases is certainly a virtue, but not at the expense of a fair trial. We are not at liberty to assume that the above expressions were made in a jocular manner nor that they did not prejudice the defendants in any manner.

This Court has reversed a conviction and a sentence following a plea of guilty for remarks of the trial Court, which seem less prejudicial than those involved here.

> "'The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges which

the court recited against the defendant, he had also been found not guilty. . . . We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving." *Townsend v. Burke*, 334 U. S. 736 (1948).

It is interesting to note that, according to an article in the Philadelphia Inquirer on Wednesday, November 19, 1958, page 11, the Court of Criminal Appeals of England ordered to be freed from prison a once-popular singer, Joan Collier, because of the comment by Sir Gerald Dodson, the Recorder of London, when Old Bailey sentenced her to nine months' imprisonment for cashing a check delivered to her by mistake, "Certainly, for the time being she has sung her last ditty."

The issue here presented far transcends the fate of the appellant immediately involved. That issue concerns the adjudicatory procedure under Anglo-Saxon law. There is now added to the inherent hazards of litigation the further danger that counsel in criminal trials must meet judicial deadlines under threat of an additional penalty for each day the trial exceeds the deadline.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Philadelphia 7, Pennsylvania,
Attorney for Petitioner.

November, 1959.

APPENDIX A.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of October one thousand nine hundred and fifty nine.

Present:

HON. LEARNED HAND,
HON. STERRY R. WATERMAN,
Circuit Judges.

HON. MORTIMER W. BYERS,
District Judge.

United States of America,
Plaintiff-Appellee

v.

Peter Casella,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to Peter Casella . . . is affirmed.

. . . .

A. Daniel Fusaro,
Clerk.

APPENDIX B.

Order Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,
Plaintiff-Appellee,

-against-

Peter Casella,
Defendant-Appellant.

Before: LEARNED HAND and STERRY R. WATERMAN, *Circuit Judges* and MORTIMER W. BYERS, *District Judge.*

ON Petition for Rehearing on behalf of appellant Peter Casella; and, alternatively, Motion to Stay Issuance of Mandate.

PER CURIAM.

Petition for rehearing on Behalf of Peter Casella, and alternatively, motion to stay issuance of mandate denied.

/s/ LEARNED HAND,
/s/ STERRY R. WATERMAN,
United States Circuit Judges.

/s/ MORTIMER W. BYERS,
United States District Judge.

November 2, 1959.

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15, 16, 17

Nos. ~~555~~, ~~556~~, ~~557~~, ~~529~~ Misc., ~~547~~ Misc.

MAY
JAMES R. BROWNING, Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1959

PETER CASELLA, PETITIONER

v.

UNITED STATES OF AMERICA

EMILIO D'ARIA AND JAMES LEO MASSI, PETITIONERS

v.

UNITED STATES OF AMERICA

JOSEPH PAUL LO PICCOLO, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES SANTORE, PETITIONER

v.

UNITED STATES OF AMERICA

LORENZO ORLANDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 555

PETER CASELLA, PETITIONER *v.* UNITED STATES OF AMERICA

No. 556

EMILIO D'ARIA AND JAMES LEO MASSI, PETITIONERS *v.* UNITED STATES OF AMERICA

No. 557

JOSEPH PAUL LO PICCOLO, PETITIONER *v.* UNITED STATES OF AMERICA

No. 520 Misc.

JAMES SANTORE, PETITIONER *v.* UNITED STATES OF AMERICA

No. 521 Misc.

LORENZO ORLANDO, PETITIONER *v.* UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (V–R. 1–42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1959. Petitions for a rehearing filed by petitioners D'Aria and Massi were denied on October 15, 1959. Petitions for a rehearing filed by petitioners Casella and Santore were denied on November 2, 1959.[1] By order of Mr. Justice Harlan, the time for filing petitions for certiorari was extended for all petitioners to December 1, 1959. The petitions for writs of certiorari were all filed on or before December 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. All the petitioners except Santore (No. 520 Misc.) question the sufficiency of the evidence to support their conviction and the applicability to them of the statutory presumption arising from possession.

2. Santore (No. 520 Misc.) presents the question whether he was entrapped as a matter of law.

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[1] The government filed a petition for rehearing *en banc* on October 16, 1959, to which the court of appeals ordered all defendants to file answering briefs. The government thereafter asked this Court for several extensions of time within which to file a brief in opposition, which requests were granted. Although the court of appeals has not yet finally ruled on the government motion for a rehearing, our brief in opposition is now filed in order to permit a ruling by the Court before the end of the term.

3. Orlando (No. 521 Misc.) presents the question whether a search warrant was sufficiently specific in its description of the premises to be searched.

4. Casella (No. 555) questions the propriety of a remark by the court to counsel and of the sentence imposed.

5. Lo Piccolo (No. 557) questions the trial court's rulings:

a. refusing to turn over the minutes of the grand jury testimony of government witnesses.

b. reserving its ruling on a motion for judgment of acquittal until the close of the case.

STATUTES INVOLVED

21 U.S.C. 173 provides, in pertinent part:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. * * *

21 U.S.C. 174 provides, in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any

such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * * * *

STATEMENT

I

An indictment returned in the Southern District of New York charged petitioners with various violations of 21 U.S.C. 173 and 174, as follows:

Count 1: sale, etc. of 17 ounces, 161 grains, of heroin on October 21, 1957 (naming petitioners Casella, Santore, D'Aria and Massi).

Count 2: sale, etc. of 16 ounces, 390 grains, of heroin on December 11, 1957 (naming Casella, Santore and Lo Piccolo).

Count 3: sale, etc. of 9 ounces, 197 grains, of smoking opium on December 19, 1957 (naming Casella and Santore).

Count 4: possession, etc. of 6 pounds, 6 ounces, 302 grains, of heroin on January 21, 1958 (naming defendants other than petitioners).

Count 5: conspiracy of all petitioners and others from September, 1957, through January, 1958, to conceal, possess, buy and sell narcotic drugs, alleging 32 overt acts (I–R. 17–27).

The district court, sitting without a jury, found all petitioners guilty as charged (I–R. 130; III–R. 328).

The evidence was developed primarily through the activities of two agents of the Federal Bureau of Narcotics, Marshall and Picini, who posed as narcotics buyers. From the order in which their contacts with petitioners were made, a brief outline of the relationship of the petitioners to each other and to the alleged conspiracy appears:

(1) Santore,[2] who arranged for the agents a number of purchases of narcotics in Philadelphia, after which he introduced them to

(2) Casella,[3] who agreed to supply the agents with unlimited quantities of heroin. After making various references to his "New York partners", he indentified them as

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[2] Found guilty on counts 1, 2, 3 and 5 (I–R. 130); sentenced to twenty years' imprisonment on each count, to be concurrent with each other, but consecutive to sentences in New Jersey and Pennsylvania (Pet. 3); affirmed by the court of appeals as to counts 1, 3 and 5; reversed as to count 2 (V–R. 34), Judge Byers dissenting (V–R. 37).

[3] Found guilty on counts 1, 2, 3 and 5 (I–R. 130); sentenced to twenty years on counts 1 and 2, to be concurrent with each other, and twenty years on counts 3 and 5, to be concurrent with each other but consecutive to the twenty years on counts 1 and 2 (II–R. 77); affirmed (V–R. 34).

(3) D'Aria and Massi,[4] who approved a delivery of heroin to the agents without immediate payment. The trail also led to

(4) Lo Piccolo,[5] who was the source from which the narcotics were obtained. Assisting Lo Piccolo was

(5) Lorenzo Orlando,[6] in whose residence a large quantity of narcotics and equipment was uncovered.

On appeal, the chief issue raised was the sufficiency of the evidence, particularly with respect to knowledge of illegal importation. The court of appeals held that, under 21 U.S.C. 174, knowledge of importation could be based on the presumption arising from possession, and that the required possession could be constructive possession, but that some possession by each defendant had to be proved in order to bring the presumption into play. On the basis that no possession, actual or constructive, had been shown, it reversed the convictions as to two co-defendants and also reversed the convictions of Santore and Lo Piccolo on count 2.[7] In other respects it affirmed the judgments below.

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[4] Found guilty on counts 1 and 5 (I–R. 130); sentenced to ten years on each count, to be concurrent (I–R. 147); affirmed (V–R. 34), Judge Hand dissenting (V–R. 34–36).

[5] Found guilty on counts 2 and 5 (I–R. 130); sentenced to twenty years on each count, to be concurrent (III–R. 328–329); affirmed as to count 5, reversed as to count 2 (V–R. 34), Judge Byers dissenting (V–R. 37).

[6] Found guilty on count 5 (I–R. 130); sentenced to five years; affirmed (V–R. 34).

[7] This aspect of its holding is presently being considered by the court of appeals *en banc*. See fn. 1, *supra*, p. 2. District Judge Byers dissented from so much of the judgment as granted reversal. Judge Hand dissented from the affirmance of the judgment as to D'Aria and Massi on the ground that the presumption created by 21 U.S.C. 174 could not be based on constructive possession.

II

In more detail the evidence was as follows:

A. *Count 1 (Transaction on October 21, 1957).* After the two agents, Marshall and Picini, had made a number of purchases of narcotics in Philadelphia, arranged through Santore, the latter agreed to introduce them to his "New York connection", for an agreed consideration (II–R. 14, 31). Accordingly, on October 16, 1957, the agents were introduced to Casella. At the first meeting Casella said that he had been told by Santore, who had arranged the meeting, that the two were interested in pure heroin, and that he could supply them "with amounts anywhere from a half a kilo to a ton of heroin with the quality just as it comes off the boat" (II–R. 15–16, 32). Arrangements were made for the purchase by the agents of half a kilo of heroin.

Casella told the two agents to meet him at the bar of the Hotel Lexington in New York on Monday, October 21, at 6:00 p.m. They were to park their car in a lot across the street from the hotel, where delivery of the drugs was to be made (II–R. 16–17, 32).

Marshall alone kept this appointment, explaining to Santore that he did not have the money, due to a sudden heart attack suffered by his partner. Santore placed the heroin in the trunk of Marshall's car, which was left in the parking lot, while the two went over to the hotel to discuss the situation with Casella. Casella said he would have to consult with his "partners" (II–R. 17–18).

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Meeting D'Aria and Massi* at the Paddock Bar, Casella was heard to say that he did not have the money; that "one of them" got sick and his partner came alone; that the package was in the trunk of their car; and that they were good for the money. D'Aria and Massi discussed the situation and eventually accepted Casella's suggestion that the delivery to Marshall be completed and that they come to Philadelphia the following Wednesday to get their share of the money (II–R. 55–60).

On Wednesday, October 23, D'Aria and Massi made the trip from New York to Philadelphia. While they were en route Casella and Santore accompanied Marshall from Philadelphia to the King Cole Motel, on the Black Horse Pike in New Jersey, where Picini paid them off. Casella told the agents that he was expecting his New York partners. Upon his return to Philadelphia, Casella met D'Aria and Massi, who had arrived in the meantime, and was closeted with them for about thirty minutes (II–R. 19–20, 33–34; IV–R. 47–50).

B. *Count 2.* On December 10, the two agents met with Casella and Santore at the Vesuvio Restaurant in New York to arrange for a delivery of heroin (II–R. 21–23). While arrangements were being made, Casella excused himself from the table and was seen talking with Lo Piccolo. When Casella re-

* At about 4:30 that afternoon, Santore Casella and D'Aria had been observed talking together in front of the Hotel Lexington. After a few minutes conversation, Santore and D'Aria left in a car driven by D'Aria (IV–R. 33).

turned to the table, he said that everything was arranged (II–R. 22, 35–36).

The following afternoon Casella went to the apartment house in which Lo Piccolo lived, where he remained for about thirty minutes (II–R. 37, 51). He then reported that a half kilo of heroin would be delivered to Marshall's room at the Edison Hotel that night at 9:00 o'clock. Casella stated that he wanted to give the room key to his people and it was accordingly turned over to him. Marshall drove him to Lo Piccolo's apartment and waited while Casella was gone for about twenty minutes (II–R. 24, 38, 51–52).

That evening at 9:00 o'clock, Ignazio Orlando was observed going to Marshall's hotel room, carrying a package. He unlocked the door, remained two or three minutes and then left, without his package (Tr. 508–511, 817–823). Orlando then got into a car in which Lo Piccolo was waiting and drove to the latter's apartment building (Tr. 373, 374, 511–513, 686, 687). In the meantime, Marshall went to his room and found the half kilo of heroin in the place agreed upon. Payment of $6,000 was then made to Santore, at Casella's direction (Tr. 113, 278, 823). The court of appeals reversed except as to Casella and Ignazio Orlando, who has not sought further review.

C. *Count 3.* On December 19, 1957, Marshall drove Santore and Casella to a point near the apartment building of Lo Piccolo. While Marshall waited in the car, the two petitioners entered the apartment building. Santore waited in the lobby, while Casella went to the apartment of Lo Piccolo. Voices were

heard within, following which Casella came out, carrying a package. He rejoined Santore in the lobby and Santore made delivery of two cans of opium* to Marshall back at the car (II–R. 26–27, 40–41, 52–53, 62–64). The court of appeals affirmed the conviction of Santore and Casella on this count.

D. On January 20, 1958, in the late afternoon, Ignazio Orlando delivered a package to Lo Piccolo's apartment. Immediately following, Lo Piccolo entered his apartment and pulled down the blinds. When young Orlando left, he went to the home of his father, petitioner Lorenzo Orlando, on Long Island. The light in an attic room (where a subsequent search under the search warrant discussed below uncovered a large quantity of narcotics) went on and then off. Young Orlando emerged from the house soon afterward, carrying a large package wrapped in the same manner but smaller than the package which he had earlier delivered to Lo Piccolo's apartment (III–R. 114–116; IV–R. 41–42, 53).

On January 22, 1958, the day fixed by Casella for a big delivery to be made at the King Cole Motel in New Jersey, young Orlando drove to the vicinity of Lo Piccolo's apartment house, where the latter joined him. They then drove together to the Long Island home of petitioner Lorenzo Orlando. Again the light in the attic room was seen to go on and then off, fol-

* These cans were to be samples of the opium to be delivered in a sale involving $100,000 worth of opium and $50,000 worth of heroin, the delivery of which, on January 23, 1958, resulted in the arrest of all the petitioners (II–R. 28–29, 42–43).

lowing which Lo Piccolo and young Orlando came out, carrying a box, the same in size and shape as that in which narcotics were found when Santore was arrested at the King Cole Motel a few hours later (III-R. 117-119, 165-170).

Lo Piccolo was arrested early the following morning, at which time he denied that he knew or had been with Ignazio Orlando. On petitioner's person at the time of his arrest was a road map of New Jersey, with the penciled notation, "Hammonton 4 miles—Black Horse" (III-R. 52, 107-109; IV-R. 76-77).

A search warrant was obtained for the premises of Lorenzo Orlando. In executing the warrant, the officers found a locked door leading off the bathroom (IV-R. 69). In response to the officers' inquiries, petitioner falsely stated that the rooms were rented to a man named Frank and his wife (IV-R. 70). Petitioner denied having a key, but a key fitting the lock was later found in petitioner's overcoat pocket (IV-R. 73). When the officers started to force the door, petitioner objected, saying the people might be sleeping (IV-R. 71). The agents broke through the door and found eighteen half-kilo bags. When asked what they were, Orlando answered that they contained heroin and admitted ownership (IV-R. 72).

ARGUMENT

1. In one form or another all of the petitioners (other than Santore) argue that the evidence was insufficient to show their implication in the conspiracy or to establish the kind of possession which would give

rise to the statutory presumption of knowledge of illegal importation.

a. Before taking up in detail the arguments made, we think it should be noted that, insofar as the sale of heroin is involved,[10] there was no need to rely on the statutory presumption as to any of the petitioners to establish knowledge of illegal importation. Since 1924 no heroin has been legally importable for any purpose and no opium could be imported for the manufacture of heroin. 21 U.S.C. 173, as amended by 43 Stat. 657. Since 1956 no heroin could lawfully be outstanding, even for scientific purposes. 18 U.S.C. 1402. The courts judicially notice that opium is not commercially grown in this country. *Biegler* v. *United States*, 86 F. 2d 41 (C.A. 7), certiorari denied, 300 U.S. 677; *United States* v. *One 1937 Hudson T. Coupe*, 21 F. Supp. 600, 603 (W.D. Ky.); *United States* v. *Yee Fing*, 222 Fed. 154, 156 (D. Mont.). It is a reasonable inference, therefore, that no one could deal in heroin on the scale here proved without knowing that it had to be illegally imported.

b. Beyond that, as appears from the Statement, *supra*, pp. 7–11, the evidence as to each of the petitioners was ample to show his implication in the conspiracy and sufficient possession to justify the statutory presumption. Even accepting the limitation of the court below that there had to be either direct proof of each petitioner's knowledge of illegal impor-

[10] Count 3 involved smoking opium rather than heroin. However, only Casella and Santore stand convicted on that count and, as to each of them, the sentence on that count runs concurrently with another sentence that involves heroin.

tation, or direct proof of his possession of narcotics, the court below found the test adequately met.

(1) As to Casella, there was proof of his knowledge of illegal importation. When he first met the agents, he said he could get them heroin just as it came from the boat. He was not limiting his remarks to any particular transaction, but referring generally to the heroin he would sell the agents. He was equally specific as to the opium involved in count 3 of the indictment. He stated that it "was supposed to come from Turkey and was called red Turkey smoking opium" (II–R. 21).

In addition, he himself carried the package of opium involved in count 3. Moreover, as to the other deliveries, the relationship between Santore and Casella was so direct that Santore's manual possession of the drugs at the time he made delivery was equally the possession of Casella. The situation presents no abstruse problem of "constructive possession." It is simply a case of *qui facit per alium, facit per se.* Cf. *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 347.

(2) D'Aria and Massi were clearly implicated in the conspiracy as partners of Casella. Although the proof related to their actions with respect to the events of count 1, their participation in that sale shows them to have been active participants in the conspiracy as a whole. They were the ones who had to decide whether delivery could be made although full payment had not been forthcoming. Thus they were the ones who had control of whether the narcotics would be turned over to the agents. Their participation was

much more intimate and direct than that of the minor retailers or deliverers in the cases on which these petitioners rely, where the Second Circuit held that a single isolated transaction was not a sufficient basis on which to bottom an inference of continuing participation in a conspiracy. (Pet. No. 556, 15–16).

These men were associated with Casella in a business in which they had a community of interest in the profits gained (as shown by their meeting in Philadelphia to divide up the payment on the first purchase of narcotics) and in the losses which might be sustained (as shown by their agreement in the Paddock Bar to take a chance on a delayed payment for the narcotics). The frequent reference by Casella to these men as partners was admissible as evidence after their participation in the conspiracy was established by independent evidence. *Glasser* v. *United States,* 315 U.S. 60, 74.

In view of that direct partnership relationship, the direct knowledge of Casella that the narcotics in which he was dealing were illegally imported, discussed *supra,* page 13, is attributable to his partners D'Aria and Massi. Cf. *Commissioner of Internal Revenue* v. *Tower,* 327 U.S. 280, 286; *Walling* v. *Plymouth Manufacturing Corp.,* 139 F. 2d 178, 182 (C.A. 7), certiorari denied, 322 U.S. 741.

Moreover, as noted, D'Aria and Massi had the final control of whether the heroin would be delivered to the agents on October 21. Thus, while they did not have manual possession of the narcotics, they had sufficient direct control to give rise to the statutory pre-

sumption. We think that this evidence meets even Judge Hand's test that the possession must be "unconditionally subject to the 'possessors' demand for custody," although we believe with the majority that that is too narrow a test.

Unless the legislative purpose was to confine the statutory presumption to the "smaller fry" in the illicit drugs traffic, possession should not be so constricted as to apply only to those who manually handle narcotics, or have equivalent control thereof. Judge Hand pointed out that 26 U.S.C. 4724, enacted five years after 21 U.S.C. 174, used the expression "possession or control," leading him to believe that possession alone should not be interpreted so as to include control. The use of additional clarifying words by a subsequent Congress does not, however, throw any appreciable light on the intent of the earlier Congress. It seems difficult to believe that Congress intended that one who has been shown to have the power to direct the disposition of narcotics could escape the effect of the statutory presumption by having some one else make delivery for him. Other circuits,[11] and the Second Circuit in previous opin-

[11] *Gallegos* v. *United States*, 237 F. 2d 694 (C.A. 10); *United States* v. *Chiarelli*, 192 F. 2d 528, 531 (C.A. 7); *Brown* v. *United States*, 222 F. 2d 293 (C.A. 9). *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7), cited in the dissent, merely held, on the facts there presented, that a person other than appellant had actual control of the narcotics. During national prohibition, control of intoxicating liquor was interpreted as connoting possession. See *e.g.*, *Murphy* v. *United States*, 18 F. 2d 509, 512 (C.A. 8); *Bergedorff* v. *United States*, 37 F. 2d 248, 249 (C.A. 10). This is also the view in state narcotics cases. See *People* v. *Rodriguez*, 151 Cal. App. 2d 598, 312 Pac. 2d 272, 274; *People*

ions,[12] have rejected attempted distinctions between possession and control.

(3) Even though the court of appeals reversed Lo Piccolo's conviction on count 2 despite evidence that the narcotics there involved came from his apartment, the evidence of that fact, plus the evidence that Lo Piccolo was (together with Orlando) the source of the narcotics involved in count 2, clearly shows his implication in the conspiracy. When, added to that, he was shown actually to have carried a box similar to that in which narcotics were found on January 23, under circumstances which clearly justify the inference that the box he carried was the box involved in that sale (see the Statement, *supra*, p. 11), his conviction on the conspiracy count was properly affirmed. This petitioner is in error in his argument (Pet. No. 557, 16–20) that what the other defendants did (by going to his apartment and emerging with a package, etc.) cannot be considered against him until his connection with the conspiracy is otherwise established. The acts of the various alleged participants, established by independent observation, may properly be considered against all in determining whether a conspiracy exists and the nature thereof; it is only as to declarations made by others that there must first be proof of membership in the conspiracy. See

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v. *Lunbeck*, 146 Cal. App. 2d 539, 303 Pac. 2d 1082; *De Vine* v. *State*, 206 S.W. 2d 247, 249 (Tex. Cr. App.) and, also, *Republic of Hawaii* v. *Awai*, 12 Haw. 174.

[12] *United States* v. *Moia*, 251 F. 2d 255 (C.A. 2); *United States* v. *Cohen*, 124 F. 2d 164 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811; *United States* v. *Kronenberg*, 134 F. 2d 483, 484 (C.A. 2).

Lutwak v. *United States*, 344 U.S. 604, 617. Here the acts of the various defendants, when fitted together, show that Lo Piccolo was the supplier of narcotics. As the court below pointed out, that conclusion, established by independent evidence, is merely reinforced by statements made by Casella that Lo Piccolo was his "connection". The fact that Lo Piccolo did not know every member of the conspiracy does not serve to absolve him from responsibility as the supplier of narcotics. See *Blumenthal* v. *United States*, 332 U.S. 539.

(4) Orlando argues that his possession of narcotics does not show him to have been a member of the conspiracy and that, in any event, his prior conviction for the substantive crime made it improper to hold him for the conspiracy. The evidence, however, justifies the inference that, aside from the narcotics found by the search warrant, Orlando had had the narcotics involved in the delivery of January 23 and other narcotics handled by the conspirators as well. The narcotics found under the warrant serve merely to illuminate the prior evidence as to him and clarify his role. He was thus shown to be an active participant in the conspiracy, and responsible for the various sales made pursuant thereto. Hence his conviction for the narcotics found in his possession and not yet sold does not relieve him of responsibility for his part in the conspiracy relating to other prior sales.

2. Petitioner Santore (No. 520 Misc.) was not entrapped into the sales of narcotics in which he participated. He concedes (Pet. 6) that the government

testimony established sufficient excuse for the federal agents' first transaction with him, which preceded the transactions charged in this indictment, but argues that, at some indeterminate point in the dealings with the federal agents, continued trafficking with this petitioner became unconscionable because he was already so thoroughly enmeshed in the toils of the law. The short answer is that the first sale in New York will alone support his sentence.[13]

No authority is cited for the proposition that a certain limit should be imposed to continued dealing with a person who has thoroughly incriminated himself, and such a rule would be hopelessly vague and incapable of practical application. The obvious purpose of continuing to deal with, or through, this petitioner was to obtain further evidence as to the more important members of the conspiracy. Petitioner concedes that this is a proper purpose, but contends that it is morally wrong that these further transactions should be held against him.

The considerations urged are and should be of weight with the sentencing authority. Here they obviously were considered by the trial judge, who made all the sentences concurrent, although consecutive to the sentences in the Third Circuit. That

[13] Santore was convicted for participation in three sales made, respectively, on October 21, December 11 and December 19, 1957 (counts 1, 2 and 3) and for conspiracy (count 5). He was sentenced to imprisonment for twenty years on each count, to run concurrently, but consecutively to sentences imposed in the Third Circuit (I–R. 130). His conviction on count 2 was reversed (V–R. 34), Judge Byers dissenting (V–R. 37). As a second offender, petitioner was subject to a mandatory minimum of ten years on each count.

would seem to be a fair disposition of the case, in view of the huge extent of the operations in which this petitioner was taking part. Petitioner was quite willing, as long as the true identity of the two government agents was unknown, to go from one transaction to another. He and his immediate superior, Casella, urged the agents to take larger amounts of the narcotics (II–R. 20–25, 28, 34, 36). At no point can it be said that the federal officers held out inducements to the commission of crime to a person who would normally resist the temptation.

The difference of opinion between the majority and minority of the Court, expressed in *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman v. United States,* 356 U.S. 369, is not relevant to this case. That difference was as to whether the questions of fact should be resolved by the court or by the jury. Since in this case the judge was, by agreement, sitting as the trier of fact, that question is not involved. The reasoning of neither the majority nor the minority in those cases would lead to a conclusion that there was entrapment in this case as a matter of law.

3. The affidavit for search warrant and the search warrant adequately described petitioner Orlando's premises (No. 521 Misc.). The description in both was of "the premises known as 164 Hill Street, Elmont, Long Island, New York, being a one family house" (Pet. App.).

Upon execution of the warrant, it developed that two families were living in the house, one by the name of Drago on the first floor, and petitioner and his wife on the second floor. However, the outside ap-

pearance of the house was that of a one-family dwelling and it appeared that some time previously, the exact time of which was not shown, the subdivision had been made without permission, contrary to local ordinances. As the court of appeals pointed out, law-enforcement authorities could not be charged with notice of something which had thus surreptitiously been done (V–R. 27–28).

The Fourth Amendment requires that search warrants particularly describe the place to be searched. The degree of particularity thus required necessarily turns on the facts of the individual case. A standard of reasonableness in such matters does not call for omniscience on the part of the authorities. They cannot reasonably be required to know that a house which, from the outside, appears to be occupied by one family has been altered inside, in violation of law, to house two families. Cf. *Carney* v. *United States*, 79 F. 2d 821, 822 (C.A. 6).

4. The various other matters raised do not require extensive comment.

a. Petitioner Casella (Pet. No. 555, 13–15) was properly sentenced. Sentences on counts one and two were each for twenty years, to be concurrent. In view of the fact that they involved separate sales of very substantial quantities of narcotics, they could properly have been made consecutive. The similar sentences on counts three and five, involving another separate substantive count and the conspiracy count, were likewise concurrent with each other, thereby eliminating any question of "cumulating sentences by verbal devices," as claimed by petitioner.

In sentencing petitioner, the court said (II R. 77):

> * * * and I will say this in front of Mr. Casella, that if he wishes he may make an application to reduce the sentence, provided proof is shown me that he is making a genuine effort to cooperate, and he knows what I mean by that.
>
> You can save yourself a lifetime in jail, Mr. Casella, but the only one who can help you now is yourself.

Petitioner does not directly challenge this statement of the court but urges that cumulation of conspiracy and substantive charges should be approved only when "scrupulous regard" is shown for the rights of the defendant. This argument fails at the outset because, as above noted, there is no cumulation of conspiracy and substantive charges; the sentence for conspiracy was made concurrent with the sentence for a substantive count. The total sentence imposed is not unusual for the heavy trafficking here proved.

b. Casella also cites as error a remark to counsel, made in response to an objection to an inoffensive leading question (Pet. No. 555, 15–18). Counsel for the government stated in the court of appeals that the remark was made in a facetious manner. The accuracy of this assertion seems to be borne out by the record.[*] In a long trial, which was before the court

[*] The question objected to and the ensuing colloquy were as follows (II R. 39–40):

> By Mr. WALSH [United States Attorney].
>
> Q. Now I refer you to December 19, 1957, and ask you if on that day you had occasion to meet James Santore?
>
> Mr. EDELBAUM. I object to it on the ground it is a leading question.

sitting without a jury, objection to the question as leading when it was obviously so framed merely for the purpose of expediting the hearing was so frivolous as to invite a humorous response from the court. It is significant that the only counsel raising the issue did not participate at the trial.

c. Petitioner Lo Piccolo (Pet. No. 557, 24–31) requested that he be allowed to examine the minutes of the grand jury or that the court examine such testimony for possible inconsistencies with the testimony of witnesses on direct examination (III–R. 23–24). Both requests were refused. On appeal, the court of

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The COURT. I will sustain the objection. But we will be here until the end of July.

Mr. EDELBAUM. It is very simple, if he asks a proper question, your Honor, without being here until the end of July.

The COURT. For each day we are here after the end of June, if there is a conviction, each defendant will spend five years more.

Mr. EDELBAUM. I don't want a long trial, believe me. I just wanted to point out to Mr. Walsh that the questions were leading. That was the only purpose of my objection, without him getting so excited.

The COURT. It is leading. No doubt about it.

Mr. EDELBAUM. And I haven't been objecting.

The COURT. And that is a typical leading question from a hornbook series lawbook.

Mr. WALSH. I don't deny that, your Honor, but I just wish, if counsel are going to object, that the objection be made.

The COURT. I wish he would do that right along to save us time.

By Mr. WALSH:

Q. After the incident you just testified about on December 11th, when did you next have occasion to meet Santos and Casella?

appeals directed the trial court to examine the minutes of the grand jury testimony of all government witnesses and to certify whether inconsistences existed. The trial court did so and certified that the only inconsistencies were of such a trivial nature that they could not have made any difference in its judgment on the facts of the case. The court of appeals stated, on its examination of the minutes, that it was in agreement with the certification (V–R. 29) and that, in view of the fact that this was a court-tried case, there was a sufficient compliance with the procedure followed in that circuit (V–R. 30).

That was a proper ruling. There was no showing of "particularized need where the secrecy of the proceedings is lifted discretely and limitedly." *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 399. In view of that, petitioner received more than his due when the court of appeals required an *in camera* examination of the grand jury minutes. The time of such examination is of no significance in a case tried before the court. Nothing could be accomplished by ordering a retrial of the case in which the same examination would be repeated.

d. The court did not err in refusing to sustain petitioner Lo Piccolo's motion for judgment of acquittal at the conclusion of the government's evidence. The pertinent part of Rule 29 provides:

> * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evi-

> dence is insufficient to sustain a conviction of such offense or offenses. * * *

Petitioner's contention that the evidence was insufficient to sustain the charge of conspiracy has already been dealt with, *supra*, pp. 8–11. The contention here made is that the court refused to make its ruling, as requested, at the close of the government's case. If there were any merit to the contention that the evidence was otherwise insufficient to sustain a conviction, and if such deficiency were supplied by the evidence given by the other defendants, petitioner's argument would be relevant. But here the government's evidence amply sustained the charges and the trial court stated that it did not consider any of the evidence given by the other defendants in arriving at its verdict of guilty as to this petitioner (V–R. 32–33).

Petitioner does not point to anything specific in the testimony of the testifying defendants which would sustain the case against him. Even if there were such testimony, a trained legal mind would have no difficulty in applying such evidence only to the defendants who had not rested. There is no reason for disbelieving the court's statement that it based its finding of guilt as to this petitioner solely on the government's evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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MAY 1960.

U.S. GOVERNMENT PRINTING OFFICE

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Nos. ~~555~~ - ~~556~~ - ~~557~~

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Supreme Court of the United States

October Term, 1959

JAMES SANTORE, PETER CASELLA, EMILIO MARIA, JAMES LEO MASSI, JOSEPH PAUL LO PICCOLO and LORENZO ORLANDO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Opinion of Affirmance of United States Court of Appeals for the Second Circuit. ——. F. 2nd ——. United States Court of Appeals. Second Circuit Opinions. October Term 1958. #206. Page 2147

Lodge Appeal Press, Inc., 65 Duane Street, N. Y. C. WOrth 2-0689.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 206—October Term, 1958.

(Argued January 22, April 7, April 9, 1959
Decided October 2, 1959.)

Docket No. 25330

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES SANTORE, PETER CASELLA, EMILIO D'ARIA, JAMES LEO MASSI, JOSEPH PAUL LO PICCOLO, ANTHONY EDWARD TARLENTINO, NICHOLAS NARDUCCI, and LORENZO ORLANDO,

Appellants.

Before:

HAND and WATERMAN, *Circuit Judges*,
and BYERS, *District Judge*.

The several defendants severally appeal after trial without jury from judgments of conviction for alleged violations of 21 U. S. C. §§173, 174, Southern District of New York, Noonan, *J*. The indictment contained four counts alleging substantive offenses and a fifth count alleging conspiracy. The trial court found each defendant guilty as charged. The several appeals were heard by the same panel of this court, and have been considered together. The convictions below of Peter Casella and Ignazio Law-

rence Orlando, of James Santore on Counts 1, 3 and 5, and of Joseph Paul Lo Piccolo on Count 5 are unanimously affirmed. The convictions below of Emilio D'Aria and James Leo Massi are affirmed by a majority of the Court, Judge Hand dissenting. The convictions below of Anthony Edward Tarlentino and Nicholas Narducci, and on Count 2 of James Santore and Joseph Paul Lo Piccolo are reversed by a majority of the Court, Judge Byers dissenting.

ARTHUR H. CHRISTY, U. S. Attorney, Southern District of New York (William Desmond Walsh, Spec. Asst. U. S. Attorney; Kevin Thomas Duffy, George I. Gordon, Asst. U. S. Attorneys, of counsel), *for Appellee.*

THOMAS A. SHAW, JR., New York City, *for appellants Santore and Orlando.*

JACOB KOSSMAN (Stanford Shmukler, of counsel), Philadelphia, Pa., *for appellant Casella.*

CURRAN, MAHONEY, COHN & STIM (Menahem Stim, of counsel), New York City, *for appellants D'Aria and Massi.*

MAURICE EDELBAUM (Chester E. Kleinberg, of counsel), New York City, *for appellant Lo Piccolo.*

STUART H. JOHNSON, JR., New York City, *for appellants Tarlentino and Narducci.*

WATERMAN, *Circuit Judge:*

On February 5, 1958 an indictment was filed in the Southern District of New York charging all of the appellants herein and three others with violations of 21

U. S. C. §173[1] and §174.[2] Count One of the five count indictment alleged that Peter Casella, James Santore, Emilio D'Aria and James Leo Massi sold 17 ounces, 161 grains of heroin on October 21, 1957. Count Two charged Peter

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1. The pertinent portion of 21 U. S. C. §173 reads as follows:

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures. It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

* * * * * *

2. 21 U. S. C. §174 reads as follows:

§174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Casella, Joseph Paul Lo Piccolo, James Santore and Ignazio Lawrence Orlando with the sale of 16 ounces, 390 grains of heroin on December 11, 1957. In the third count Peter Casella and James Santore were accused of selling 9 ounces, 197 grains of smoking opium on December 19, 1957. Nicholas Narducci, Anthony Napolitano, Ignazio Lawrence Orlando, Anthony Edward Tarlentino and Nicholas Tolentino were charged in Count Four with the possession on January 21, 1958 of 6 pounds, 6 ounces, 302 grains of heroin. And the fifth and last count charged all of the above and Lorenzo Orlando with conspiring from September 1957 through January 1958 to conceal, possess, buy, and sell a quantity of narcotic drugs, the exact amount and nature thereof being unknown. The indictment also listed thirty-two overt acts alleged to have been undertaken in pursuance of the conspiracy charged in Count Five.

Anthony Napolitano and Nicholas Tolentino were not apprehended. The remaining indictees waived a jury and went to trial on June 3, 1958 before a district judge sitting without jury. On July 3, 1958, after seventeen days of trial, the court found each of the defendants guilty as charged. All but Ignazio Lawrence Orlando are contesting their convictions on this appeal.

The facts of this case are lengthy and involved, spelling out as they do the sordid story of large scale trafficking in narcotics, but as the appellants contend that there was insufficient evidence to support their convictions, and as Santore presents to us the defense of entrapment, rejected below, we must go into the facts in some detail. The district court accepted the testimony of the Government's witnesses throughout, even where their testimony was contradicted by defense witnesses, and since from our perusal of the record that acceptance seems reasonable

enough, we state the facts as they were presented at trial by the Government.

Michael Picini, an agent of the Federal Bureau of Narcotics, first met Santore on February 26, 1957 at the 39th Ward Independent Republican Club in Philadelphia, Pennsylvania. Picini introduced himself as an out-of-town narcotics peddler, mentioned the name of a friend of Santore in Baltimore, and expressed a desire to buy a sample quarter kilo of heroin. After at first stating that "his people wouldn't sell less than a half kilo," Santore finally fixed a price of $3,500 for a quarter kilo and told Picini to let him know when he was ready to buy. Subsequently, at a second meeting on March 4, 1957, Santore reintroduced the subject of narcotics by asking Picini if he was still interested in purchasing heroin.

On March 8, Santore introduced Picini to Frank Valli, a Philadelphia drug trafficker. At that time, however, no agreement to purchase was made. On March 20, Picini introduced another agent, Eugene Marshall, to Santore and Valli, describing him as his partner. During the evening of the 21st arrangements were made for the purchase of six ounces of heroin, and the agents gave Santore an agreed price of $3,150. Two days later, following Santore's instructions, the agents picked up the drugs. A second sale consisting of one-sixth of a kilo of heroin was made on April 3.

After the second sale the agents told Santore that they were dissatisfied with the quality of the drugs they were receiving, and he thereupon introduced them to another local trafficker, Frank Malfi. Following this meeting two purchases of heroin, one-quarter of a kilo on July 25 and one-half kilo on August 22, were made through Santore and Malfi.

Picini and Marshall advised Santore that they still were not satisfied with the drugs being supplied them by Philadelphia peddlers, and insisted that Santore take them directly to his New York "connection." Santore did not respond to the agents' demand immediately but finally offered to make the introduction in return for $2,000. On October 16, 1957, Santore introduced the agents to Peter Casella, who offered to supply them with any amount of pure heroin they desired. He stated that this pure heroin could be supplied in "amounts anywhere from half a kilo to a ton * * * with the quality just as it comes off the boat" and he set its price at $11,000 a kilo. After some discussion Casella instructed the agents to meet him on October 21st at the Hotel Lexington in New York City. The agents were to park their automobile in the parking lot across the street from the hotel and the heroin was to be placed in it.

About 4:30 P.M. on October 21, Santore and Casella were seen conversing with Emilio D'Aria in front of the Hotel Lexington. After a brief discussion Santore and D'Aria entered D'Aria's car and drove off together.

At 6:00 P.M. Marshall arrived at the parking lot and was met by Santore who gave him a package from his pocket containing one-half of a kilo of pure heroin. After Marshall placed the package in the trunk of his car, he informed Santore that he was then unable to pay for it because Picini, who had the funds, was in a Trenton hospital. This story was repeated to Casella in the hotel cocktail lounge. He at first insisted that the drugs would have to be removed from the car and returned to him, but, after the problem was discussed over dinner at a restaurant, Casella finally agreed that Marshall could keep the drugs on consignment if Casella's "New York partners" gave their consent to it.

Casella left Marshall and Santore to wait while he went to see his partners, and was followed to the Paddock Bar on Broadway. He seated himself at the bar and a government agent sat down one stool away. D'Aria and James Leo Massi then entered the bar, joined Casella, and engaged in conversation with him.

After an initial greeting, Casella said: "I don't have the money. One of them got sick and his partner came alone." D'Aria then asked, "Where is the package now?"— and Casella replied, "It's in the trunk of their car on the East Side. They're good for the money." There was still some hesitation on Massi's part, and Casella then stated, "Look, they're going to give me the money tomorrow. You come down on Wednesday and you'll get your money." After the three had apparently agreed to Casella's plan, the seated agent got up and left the bar.

After some additional twenty minutes of conversation Casella, still under surveillance, left the Paddock Bar and returned to Marshall and Santore. He told them that he had convinced his partners that Marshall could keep the package, but that full payment for it must be had by October 23 when the partners were going to Philadelphia for their share of the purchase price.

October 23 Marshall met Santore in Philadelphia and told him that in order to get the money he and Casella would have to accompany Marshall to where Picini was staying, at the King Kole Motel in New Jersey. The agent and Santore then picked up Casella at a flower shop in Philadelphia. At first Casella did not want to leave with them, for he was expecting the arrival of his partners from New York, but he finally agreed, and the three drove to the King Kole Motel. There Picini paid Casella $5,500 for the narcotics and paid Santore an agreed-upon $1000 bonus, in lieu of the promised $2,000

On that same day agents followed D'Aria and Massi from New York to Philadelphia where they went directly to the flower shop. There they waited for Santore and Casella until the latter two returned from New Jersey.

During the month of November the agents and Santore and Casella discussed the possibility of a partnership for the sale of opium—from Turkey and the best available "called red Turkey smoking opium"—but nothing came of the discussions. The agents desired to see an opium "sample," but Santore indicated a delivery of one would be delayed. Toward the end of that month, however, at Santore's urging, tentative arrangements were made for another purchase of heroin.

In New York, on December 10, the two agents met with Santore and Casella at the Hotel Edison to discuss the details of this heroin purchase. At dinner that evening at a restaurant Casella announced that he had to call his "connection." After telephoning, he stated that his connection would be there shortly, and that the connection was the same person who had supplied the heroin for the October 21 sale. Soon Joseph Lo Piccolo entered the restaurant and Casella joined him immediately. After some discussion with Lo Piccolo Casella returned to the table and said that everything had been arranged and that all he needed to know was the quantity to be delivered.

The next day Picini told Casella that he wanted to purchase another half kilo, and the latter said that he would see his connection about it. Casella was then followed to the apartment house where Lo Piccolo had an apartment. He remained inside the building for half an hour. Upon his return to the hotel where Santore, Marshall and Picini were waiting he said that the drugs would be delivered that evening at 9:00 P.M. It was agreed that the drugs were to be placed in a bureau drawer in the agents' room at the Hotel Edison while they were absent from it. To

enable the delivery to be made in this manner Marshall gave Casella his room key, and the latter said that he would "give the key to his people." Casella then proceeded to the same apartment building that he had entered earlier in the day, and upon his return told Marshall that he had given the key to his supplier and that the delivery would be on schedule.

At 9:00 P.M. that evening Ignazio Lawrence Orlando entered the hotel, went to the agents' room, unlocked the door, entered, and closed the door behind him. A few minutes later he came out of the room and left the hotel. As he went by Casella and Marshall, who were standing outside, Casella said "Everything is all right, the stuff is in the room." Ignazio Orlando then got into a car in which Lo Piccolo was already seated and drove to the latter's apartment building. There Orlando alighted, went into the basement garage, got into his own car, and drove away. Lo Piccolo drove off in the car they both had been in.

No one had gone into the agents' room except Ignazio Orlando. When the agents looked in the bureau they found a package containing a half-kilo of heroin. Picini then, at Casella's direction, gave $6,000 to Santore.

On December 18 Santore informed Marshall that the opium sample was now "in New York." The next day Marshall picked up Santore and Casella in Philadelphia and drove them to New York City. En route Casella stated that he could now supply raw opium at $1300 a kilo, or smoking opium at $450 per four ounce can. In New York Casella said that he had to go to his connection's home to get the samples. He fixed a $900 price to be paid to Santore. Picini paid Santore. Casella and Santore were then followed to Lo Piccolo's apartment house, and Casella went to the door of apartment 7K where Lo

Piccolo lived. Although Casella was not observed after he stopped in front of the door of 7K, a doorbell rang, voices were overheard, and a minute later Casella had disappeared from the corridor. Some minutes later Santore, who had remained on the ground floor in the lobby, came out of the building with Casella and gave Marshall two cans of prepared opium.

Tentative plans were made between Marshall and Picini and Casella and Santore on January 3, 1958 for the sale of additional heroin and opium, and on January 8 an advance payment of $1500 was made by Picini to Santore at Casella's direction. Arrangements were then made looking toward January 21 as the tentative date for a delivery of these drugs by the New York connection to Santore; Santore was to then transport them to the agents at the King Kole Motel.

About 7:00 P. M. on January 20th Ignazio Orlando drove to the home of his father, Lorenzo Orlando, at 164 Hill Street, Elmont, Long Island. A minute or two after he entered the house a light flashed on in the attic and remained on for about two minutes. Shortly thereafter Ignazio Orlando emerged from the house carrying a package similar in appearance to another package he had been observed delivering to Lo Piccolo's apartment a few hours earlier. Ignazio Orlando put the package in his car, drove to a place in the Bronx, parked his car, met Anthony Napolitano and transferred the package to the trunk of the latter's parked car. Orlando then drove off and Napolitano walked away.

Later that evening Anthony Edward Tarlentino and Nicholas Narducci were observed in the former's car, driving back and forth past Napolitano's car, and then parking for about twenty minutes across the street from it. Tarlentino then drove off and parked again a block away.

Narducci emerged and after walking past Napolitano's car to the next corner and then back to it, began to open its trunk. Just as he was doing so, and was starting to lift out the package, federal agents drove by. Narducci released the package, closed the trunk, and returned to Tarlentino's car. They then drove away.

Tarlentino dropped Narducci off in Manhattan and then proceeded to the Bronx where he entered a bar and met Napolitano and Nicholas Tolentino. Tarlentino was overheard by an agent to say, "the kid got scared and left the package in the car" and according to the agent Tolintino replied that "they would look around, and when it looked all right, they would take the stuff away." Early the next morning Tolentino and Napolitano attempted to drive Napolitano's car away. Federal agents tried to apprehend them and gave chase. The defendants escaped, but the agents recovered the car. The package in the trunk was found to contain six and one-half pounds of pure heroin—2.94 kilograms.

Tarlentino and Narducci were arrested on the morning of January 21, and, in the custody of the agents, gave inconsistent accounts of their actions of the night before. Tarlentino stated that he took Narducci with him to a bar to keep a date with a young lady, but not finding her at the appointed place he took Narducci directly home and then returned to the bar. Narducci claimed that he had followed Tarlentino's instructions in attempting to pick up the package, and that he was unaware of its contents. When he saw the agents he thought they were police and became frightened. After making these statements, however, Narducci admitted that everything he was saying was untrue.

On January 22, at about 9:15 P.M., Ignazio Orlando and Lo Piccolo went to the home of Lorenzo Orlando.

Shortly after the two men entered the side door of the house a light went on in the attic for a brief period. A few minutes later the two men came out of the house together, placed a package in the trunk of Ignazio Orlando's car, and drove away. Agents attempted to follow, but soon had to discontinue surveillance.

About 2:00 A.M. on January 23, Santore arrived at the King Kole Motel on the Black Horse Pike in New Jersey. On instructions from Santore Marshall picked up a package from the back seat of Santore's car similar in size and shape to the package Lo Piccolo and Orlando had placed in Orlando's car several hours earlier. The package Marshall received was found to contain almost eleven pounds of pure heroin and four jars of smoking opium. Santore asked for $8,000 and was then arrested.

Lo Piccolo too on January 23, at 4:30 A.M., was also placed under arrest and was handed a copy of a search warrant for his apartment. He denied that he knew Ignazio Orlando and stated that during the evening he had just been around the city—"nowhere in particular." The agents discovered in Lo Piccolo's apartment some eight to twelve hundred dollars, and he had a map of New Jersey with the penciled notation, "Haverton four miles, Black Horse." Ignazio Orlando was also apprehended that morning when he arrived at his home.

At about the same time that Lo Piccolo and Ignazio Orlando were being arrested, agents armed with a search warrant went to the side door of Lorenzo Orlando's home. When Lorenzo came to the door he was shown a copy of the search warrant and the agents proceeded upstairs to the attic. After searching two small attic bedrooms in the presence of Orlando and his wife, the agents discovered a locked door in the bathroom. Orlando attempted to dissuade the agents from opening that door by stating that

it was the bedroom of a tenant, by denying that he had a key, and, finally, by placing himself between the agents and their objective. However, the agents forced open the door and discovered, instead of bedroom furnishings, a steamer trunk, and on it a suitcase containing over nineteen pounds of pure heroin and one pound of opium. When asked about this discovery Lorenzo Orlando stated that the contents of the suitcase were indeed narcotics and admitted ownership. Within the trunk was a complete set of laboratory equipment for the dilution and preparation of narcotics. An agent searching the basement of the house located a box containing a number of empty glassine bags, some of which contained traces of heroin. And while one of the agents was passing Orlando clothing which he had indicated he wanted to wear, the agent discovered in the pocket of the overcoat a skeleton key which opened the lock of the attic room.

When Lorenzo Orlando was subsequently interrogated he was unable to give the last name of the alleged tenant who was supposed to have occupied the attic room. And, although the door to the attic room led off the bathroom which the Orlandos apparently used, Lorenzo Orlando admitted that he had not told his wife that anyone was living in the room.

This, then, in the main, is the background of the case. Certain contentions of the appellants require a more complete statement of particular facts, but that can best be deferred until the point in question is discussed. Each of the appellants makes various individual arguments; and all, in conclusion, incorporate, where applicable, the arguments of the others.

I The Sufficiency of the Evidence

Section 174 of Title 21 makes it a crime for any person to receive, conceal, buy, sell or in any manner facilitate

the transportation, concealment or sale of any narcotic drug imported contrary to law when that person has knowledge of that narcotic drug's illegal importation. *Torres Martinez* v. *United States*, 220 F. 2d 740 (1 Cir. 1955); *Kalos* v. *United States*, 9 F. 2d 268 (8 Cir. 1925). The section also states that it shall be a crime to conspire, apparently with the same knowledge, to commit any of these activities. And, as an aid to the enforcement of this section, Congress has provided that "[w]henever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

A. *Peter Casella.*

We have no difficulty in determining that the defendant Peter Casella actively participated in the sales of narcotics and that he was a member of a conspiracy dealing with narcotic drugs. And, as to Count Three, wherein he was charged with a sale of smoking opium on or about December 19, 1957, there was sufficient evidence to support a finding that the opium then sold was illegally imported and that Casella knew it. In November Casella told the agents that through connections with a smuggler he could get them opium from Turkey, and, at dinner on December 11, he stated that while the opium was in port it had not yet been unloaded. Too, just before the sale, on December 18, Santore told Agent Marshall that the opium sample was now in New York.

However, as to Counts One and Two, charging sales of heroin, there is no evidence in the case that the heroin was illegally imported or that defendant knew it to be contraband. The Government recognizes this inadequacy of its proof, and it urges us to rely upon the statutory presumption, contained in section 174. It argues that even though

it was not shown that Casella ever physically held the heroin, or had personal custody of it, his position in the conspiracy was such that he had the "possession" the statute contemplates. Defendant, of course, takes the opposite view. He contends that he did not have actual possession of the heroin and therefore the presumption cannot operate against him with respect to it.

We have on two occasions indicated that personal custody or manual possession of narcotics by a defendant is not essential in order to bring the presumption into operation against him—that is, the drugs may physically be held by one person and possession still be in another. *United States* v. *Moia*, 251 F. 2d 255 (2 Cir. 1958); *United States* v. *Cohen*, 124 F. 2d 164 (2 Cir. 1941), *cert. denied*, 315 U. S. 811 (1942). And see *Gallegos* v. *United States*, 237 F. 2d 694 (10 Cir. 1956). While these decisions are not, perhaps, conclusive authority, for they deal with this issue in passing and without extended discussion, we follow them. The view they indicate to be the sound one is in accord with what we consider to be the proper and reasonable interpretation of the word "possession" as it is used in this particular statute. So interpreted, "possession" includes not only immediate physical control but also that control which is exercised through agents.

It is well recognized both in civil and criminal law that the word "possession" may encompass both types of control. See, e.g., *Nat. Safe Dep. Co.* v. *Illinois*, 232 U. S. 58 (1914); *People* v. *Brennequer*, 166 N. Y. S. 801, 101 Misc. 156 (1917); *Commonwealth* v. *Smith*, 187 Pa. Super. 4, 144 A. 2d 253 (1958); *Bennett Chevrolet Co.* v. *Bankers & Shippers Ins. Co.*, 190 Atl. 863 (Sp. Ct. R. I. 1937); *Reynolds* v. *Roberts*, 57 Vt. 392 (1885); *Black's Law Dictionary* (4th Ed. 1951). And while it is true that we should strictly construe criminal statutes, we are surely permitted to define a term that has long had a recognized

meaning in the law in a manner consistent with that recognized definition.

Moreover, it should be remembered that this presumption, which greatly favors the Government, was written into the section because Congress undoubtedly believed that drug trafficking should be stamped out, and that convictions of persons engaging in that traffic should be more easily obtained. Also, section 174 makes possible the imposition of the same heavy penalties provided for in that section upon those found guilty of conspiring to engage in the illicit drug traffic as upon those found guilty on substantive counts. This clearly indicates a Congressional belief that all the members of a narcotics conspiracy, not only those caught "red handed" concealing, buying, selling and transporting the drugs, have equally outraged society. Therefore we would be stultifying the Congressional intent if we should hold that Congress intended the word "possession" in this statute to be defined so as to only secure easier convictions of those members of a conspiracy, often few in number, who are shown to have had personal custody of the narcotics.

Defendant Casella points to 26 U. S. C. §§4704(a), 4705 (a), and 4721-24, Sections of the Internal Revenue Code, and argues that since convictions can be obtained under these provisions without proof that the narcotics were imported contrary to law to the defendant's knowledge, section 174 should not be interpreted as we are now interpreting it. Any thought that Congress intended these Internal Revenue provisions as a substitute for 21 U. S. C. §174 is defeated by 26 U. S. C. §4734, which provides:

> "Nothing contained in sections 4701 to 4707, inclusive, or sections 4721 to 4726, inclusive, shall be construed to impair, alter, amend or repeal any of the provisions of the act approved February 9, 1909, en-

> titled 'An Act to prohibit the importation and use of opium for other than medicinal purposes' (c. 100, 35 stat. 614; 21 U. S. C. 171-185), * * * and any amendment thereof."

This presumption of illegal possession of imported narcotics so set forth in 21 U. S. C. §174 casts the burden of going forward upon the accused to disprove importation, but it does not appear that our interpretation of this statutory presumption endangers its validity. In *Yee Hem* v. *United States*, 268 U. S. 178 (1925), the Supreme Court, in dealing with a provision couched in almost identical language, set out the following canon:

> "'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'"

It is just as "rational" and "reasonable" to infer the fact that narcotics are contraband, and that defendant had knowledge thereof, from the fact that defendant had control over them while held by another as it is to so infer because a defendant had personal or physical custody of them.

The question we must therefore answer with respect to Casella's conviction under Counts One and Two is whether the Government presented evidence sufficient to support a finding that Casella was in a position to exercise control over the heroin sold on October 21, and on December 11, 1957. While it is clear that Casella was not in sole control of the heroin sold on those dates we think it equally clear

that, together with others, he exercised some dominion over it. Casella was a full partner in the conspiracy, not simply a hired agent, and he had at least partial control over what was to be done with the contraband handled by the group. A clear illustration of his position can be seen in the events of October 21. When Marshall was unable to pay for the drugs delivered, Casella, in conjunction with his "New York partners," was able to let them go on consignment. And there is no reason for believing that this control, exercised as a result of his role in a continuing conspiracy, did not extend to the narcotics subsequently handled by the group. In our opinion Casella was, for purposes of section 174, in possession of heroin on the dates charged in Counts One and Two of the indictment. Since he made no attempt to "explain" his possession on those dates he was properly convicted.

And inasmuch as the proof of his activities that supports the Government's case on Counts One, Two and Three is also applicable to the conspiracy charge under Count Five, we also affirm the Count Five conviction.

B. *James Leo Massi and Emilio D'Aria.*

The main evidence against the defendants Emilio D'Aria and James Leo Massi is the testimony of the Narcotics Agent with respect to the conversation which he stated that he overheard between those defendants and Casella in the Paddock Bar on October 21, 1957. Both D'Aria and Massi took the stand and denied the conversation testified to by the agent, but, as we have stated above, the district court chose to believe the agent. Taken in connection with the other testimony properly bearing upon their guilt, and in context, this conversation was properly interpreted as showing the participation of D'Aria and Massi in the sale of heroin on that day and their membership in the overall conspiracy. Less than two hours before the scheduled delivery on October 21st D'Aria met Santore at the

place of transfer. After a brief conversation D'Aria and Santore drove away. An hour later Santore returned with the package of drugs in his possession. Immediately after Casella told these defendants in the bar that they would have their money by October 23rd Casella returned to the agents and told them to make payment to him by that date. Also, there is the trip to Philadelphia by D'Aria and Massi and the meeting with Santore and Casella on the date when the agents made payment for the October 21 delivery. While it is true that this evidence only relates to the first sale undertaken by the group, and only establishes that these defendants were at that time members of a conspiracy, they made no attempt to show that they ceased thereafter to be members.

There is no evidence proving that D'Aria and Massi had knowledge that the heroin was contraband, but the import of their conversation reveals that these two defendants, like Casella, exercised proprietary control over the narcotics. This is especially clear when the Paddock Bar conversation is viewed in the light of Casella's references to his "partners"—hearsay statements admissible against D'Aria and Massi because of the established joint enterprise. Under the rationale stated above with respect to the defendant Casella, it is clear that these two defendants had "possession" of the heroin prior to the time when it was turned over to Agent Marshall. And, under section 174, they, therefore, had the duty of going forward and establishing their innocence. This they failed to do.

C. *James Santore.*

With respect to Count Three charging a sale of smoking opium on December 19, 1957, there is direct proof of the guilt of James Santore. He took an active part in making arrangements for the sale and in the transaction itself, and the requisite knowledge of the illegal importa-

tion is established by the fact that he was present when Casella mentioned that he could get opium from Turkey through his connection with a smuggler. Similarly, there was evidence to establish Santore's guilt under Count Five, the conspiracy charge, to the extent that he was a member of a conspiracy to sell opium knowing it to have been imported contrary to law.

As to Count One, charging a sale of heroin on October 21, 1957, Santore's conviction, like the convictions of Casella, D'Aria and Massi, is affirmed because he did not overcome the statutory presumption contained in section 174. He physically delivered the heroin sold on that date to Agent Marshall, and had unquestioned possession of it.

Santore's conviction under Count Two, however, must be reversed. There is no evidence showing that he had possession of the heroin sold on December 11, or that he knew it was contraband. Unlike the transaction of October 21st, Santore did not actually deliver the December 11 drugs; and, as far as the record reveals, he was not a member of the conspiracy in the sense that he had a voice in deciding, or could control, what was to be done with the narcotics. On the contrary, Santore functioned only as an intermediary between the agents, as purchasers, and Casella and his partners, as sellers. For instance, on October 21 when Agent Marshall was trying to defer payment for the heroin delivered to him, Santore's permission was not sought. The defendant was, without question, an active member in the criminal conspiracy, but his membership therein was not such that, absent physical custody of the drugs, he exercised that type of control over them and their disposition which we hold constitutes possession.

D. *Joseph Lo Piccolo.*

The defendant Joseph Lo Piccolo was indicted under Count Two for engaging in a sale of heroin on December

11, 1957, and under Count Five for being a member of the narcotics conspiracy. Despite his vehement protestations to the contrary, there is no doubt in our minds that the Government established his participation in that sale and that he was a member of a drug peddling conspiracy. At dinner on the evening of December 10th, Agents Marshall and Picini and defendants Santore and Casella were discussing a purchase of heroin. During dinner Lo Piccolo entered the restaurant, and Casella left the table to talk with him. When Casella returned to the table he was able to state to the agents that everything concerning the proposed transfer of the narcotics had been arranged. The next morning when Casella learned the amount of heroin the agents desired he went to the apartment building where Lo Piccolo lived; and upon his return he stated that the heroin would be delivered at 9:00 that night to the agents' hotel room. Also, the agents' room key was taken by Casella to that building. That evening, upon leaving the hotel after delivering the drugs, Ignazio Orlando got into an automobile in which Lo Piccolo was seated, and drove that car to where his own car was parked in the basement garage of Lo Piccolo's apartment building. These events tie Lo Piccolo into the transaction of sale of December 11. Thereafter, on December 19, Casella went to Lo Piccolo's apartment to pick up opium and was overheard talking to someone in the apartment. On January 20, Ignazio Orlando carried into that apartment a package similar in shape and wrapping to other packages taken from the drug cache in Lorenzo Orlando's home. Immediately after the package arrived Lo Piccolo closed his window blinds. The last significant date before Lo Piccolo's arrest was January 22. That evening Lo Piccolo went with Ignazio Orlando to the home of the latter's father. A light went on and off in the attic, and shortly thereafter the two emerged carrying a package identical in size and shape

to the one in which drugs were discovered in New Jersey a few hours later. On being arrested the following morning, the marked map and the money were found in his apartment, and he denied knowing the defendant Ignazio Orlando. A trier of facts is not limited to drawing only those inferences most favorable to the accused, *United States* v. *Moia*, 251 F. 2d 255 (2 Cir. 1958). And when all of these various incidents of proof are viewed together, they justify the conclusion that Lo Piccolo was engaged with Casella and others in a joint enterprise. Lo Piccolo's involvement, demonstrated first by the evidence that he was engaged in the conspiracy, is overwhelmingly established when the hearsay references to Casella to his "connection" and "supplier," which then became admissible against Lo Piccolo, are considered.

But, as there was no evidence to show that Lo Piccolo knew that any of the drugs with which he or his fellow conspirators dealt, were contraband, we can sustain his convictions only if we can find that he had possession of the drugs. The record fails to establish that Lo Piccolo ever possessed heroin as early as December 11, 1957, physically, or by controlling the disposition of it, or otherwise. The drugs sold on that date were delivered to the agents' room by Ignazio Orlando. While it is quite likely that Orlando got the room key from Lo Piccolo there is no evidence tending to show that he also obtained the heroin from him. Similarly, there is no evidence tending to establish that, with respect to the heroin sold on December 11, Lo Piccolo had that type of control which we have seen was exercised by the defendants Casella, D'Aria and Massi. Consequently, his conviction on Count Two must be reversed.

But as to Count Five, since it involved a period of time extending beyond December 11, there was indeed sufficient evidence to justify a finding that Lo Piccolo was in posses-

sion of narcotics. On December 19, after stating that he had to obtain opium from his connection's home, Casella was followed to Lo Piccolo's apartment where he engaged someone in conversation and obtained two cans of prepared opium. On January 20, Ignazio Orlando carried a package similar in appearance to others transported from Lorenzo Orlando's home to Lo Piccolo's apartment, and, immediately after Ignazio Orlando's arrival, Lo Piccolo closed his window blinds. Finally, on the evening of January 22, Lo Piccolo, together with Ignazio Orlando, carried a box, identical in size and shape to the one in which drugs were discovered in New Jersey a few hours later, from Lorenzo Orlando's home to an automobile. After placing the box in the automobile, the two men drove off. Looked at in the light of all the other evidence presented, any one of these occasions justifies, in our opinion, the conclusion that Lo Piccolo was, during the time in question, in actual possession of narcotics, a possession which he did not "explain."

E. *Lorenzo Orlando.*

Lorenzo Orlando was convicted under Count Five, the only count on which he was indicted. Although he argues strenuously to the contrary, we hold that the evidence was adequate to support his conviction. A large cache of narcotics was found in a locked room in his house and a key to the room was found in his clothing. His attempts at first to keep the agents out of this room and his later statement to them that the suitcase contained heroin, plainly demonstrate that he had knowledge of the stored narcotics. Also, he admitted ownership of them. The district court was not required to believe that this was simply a selfless lie made in an attempt to prevent the involvement of wife and son. The proof supports the conclusion that Lorenzo Orlando was a member of the con-

spiracy and in possession of the narcotics found in his attic room.

F. *Nicholas Narducci and Anthony Edward Tarlentino.*

The two defendants Nicholas Narducci and Anthony Edward Tarlentino appeared on the scene only briefly, on the night of January 20, 1958 and the morning of the following day. As a result of this brief appearance the Government charged in Count Five that they were members of the conspiracy; and in Count Four that on or about January 21, 1958 they "unlawfully, wilfully and knowingly did receive, possess, conceal and facilitate the transportation and concealment of a narcotic drug." The evidence presented by the Government shows that on the night in question Narducci was observed furtively attempting to remove a package containing narcotics from the trunk of a parked automobile. Tarlentino then met with Napolitano and Tolentino and explained to them that "the kid got scared and left the package in the car." The next morning, upon their arrest, Narducci impliedly admitted that he knew that the package contained narcotics, and Tarlentino detailed a false story with respect to his behavior. While only Narducci can be said to have admitted knowing that the package contained narcotics, it is inconceivable that he would know the contents of the package while Tarlentino, the man who made contact with Napolitano and Tolentino, did not.

This proof was sufficient to justify a finding that these two defendants as alleged in Count Five were members of the group and were attempting, pursuant to an understanding with others, to remove a package of narcotics from an automobile, but we must reverse their convictions because there was no evidence whatsoever to indicate that they had knowledge that the drugs in the package were contraband drugs, and because we are not able to say from

this record that they were ever in possession, actual or constructive, of that package of narcotics or of any other narcotics handled by the group. The Government argues that Narducci's momentary grasp of the package constituted "possession" of it by him, and that at that moment the crimes with which he and Tarlentino were charged were completed. We cannot agree. A statutory presumption is valid only where there is a rational and not unreasonable connection between the ultimate fact to be presumed and the fact proved. *Yee Hem* v. *United States*, 268 U. S. 178 (1925), *supra*. The crime punishable under section 174 is not the possession of narcotics, but rather the transporting, concealing, receiving, buying or selling of narcotics; and, consequently, in order to make the statutory presumption contained in that section meet the test of validity we must define "possession" as used therein so as to include only that type of control from which it could not unreasonably be inferred that the possessor was going to commit one or more of the specified acts which have been declared criminal. Narducci's grasp of the package was clearly not such possession, for he voluntarily released it one brief moment later.

II The Defense of Entrapment

In his opening remarks to the district court, the defendant Santore raised the issue of entrapment by the federal agents. Having been rebuffed below, he now urges that defense upon us.

According to the Government's proof, Agent Michael Picini first met Santore on February 26, 1957 at the 39th Ward Republication Club in Philadelphia. At that meeting Picini stated that he had been recommended to Santore by a Baltimore friend of Santore named "T" and that he was interested in purchasing some heroin. Santore asked the

agent who he knew in Philadelphia and whether he was acquainted with Harry Riccobene. Picini replied that he had heard of Riccobene but did not know him. Santore then asked Picini how much heroin he wanted to buy, and upon being told a quarter kilo, stated that "his people" would not sell less than half a kilo. But after Picini told him that he would not make any large purchases until he first "tried the stuff," Santore set a price of $3,500 for a quarter kilo. Santore then told Picini where he could be reached, and Picini agreed to "let him know in a couple of days." All of this conversation took place in the bar there with other patrons standing 15 to 20 feet away.

The next meeting occurred on March 4, 1957, at the same place. Apparently this time it was Santore who broached the subject of narcotics. He asked Picini if he was still interested in purchasing heron, and told the agent to move out of the Essex Hotel because there "was too much law around there." Picini at that time was living in Philadelphia.

The parties met again, for a third time, on March 8, 1957. At this meeting Santore was accompanied by Frank Valle, and after the introductions Santore said to Valle, "This is the man I was talking to you about." Valle then inquired as to how much "stuff" Picini wanted to buy. Picini told him, and Valle then stated that Picini should call him that evening. Picini called as directed, but Valle told him that his connection was out of town and could not be reached.

On March 20, 1957 Picini again met Santore and Valle and accompanied them to a Chinese restaurant. At this meeting Santore stated that he had arranged for Picini to meet Harry Riccobene's brother that evening and asked for an advance of $200. That evening Picini went with Agent Marshall to the 39th Ward Independent Republican

Club. Santore led them into the kitchen, asked them for and obtained the $200, and stated that while the proposed meeting could not be had as planned that evening, definite arrangements had been made for "a buy."

On the following evening, another meeting took place at the same club. Santore announced that the heroin would be $525 an ounce; and, after some protestations as to the cost of it, Picini agreed to take six ounces. He then paid Santore $2,950 and they made arrangements to meet the next morning.

At the morning meeting Santore said "that his people had been delayed in New York and that the stuff . . . would be in Philadelphia some time that night." About 5:45 A.M. on March 23rd Santore called Picini and told him to go to the club. Picini accompanied by Marshall obeyed. At the club Santore got into the agents' car and directed them to a street intersection. When they arrived there Santore told them that the drugs were on the side porch of a luncheonette. Picini obtained them there. When they separated Santore told the agents to keep in touch with him.

Santore first attacks the plausibility of this evidence and mainly centers this attack upon the testimony relative to the initial meeting. While the writer of this opinion is astonished to learn how easily Agent Picini was able to effectively make his initial contact with Santore, we cannot say that the district court, after viewing the witness-stand behavior of Agent Picini and of the defendant who testified in his own behalf, was unjustified in believing that what Picini stated occurred actually did occur as stated. Certainly more than a reaction of mild astonishment would be required for us to intervene and set aside this fact-finding conclusion of an experienced trial judge. The Government's version of events subsequent to February 26

is readily believable and of course thereby lends plausibility to the testimony relative to the initial contact.

Accepting the facts as presented by the Government the facts do not support the defense of entrapment. It is well settled that government officers may employ artifice or stratagem to catch those engaged in criminal activities. *Sherman* v. *United States*, 356 U. S. 369 (1958); *Sorrells* v. *United States*, 287 U. S. 435 (1932). "Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. • • • To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States, supra.* Santore is clearly within the latter category. He was not reluctant to negotiate a sale of narcotics at his first meeting with Agent Picini. At their second meeting he raised the subject himself. The district court quite properly found that Picini did not persuade Santore to commit the crime and that he only provided the defendant with an opportunity which the latter was ready and willing to take advantage of. *Masciale* v. *United States*, 356 U. S. 386 (1958), *rehearing denied*, 357 U. S. 933 (1958).

Santore further maintains that even if he was not entrapped with respect to the first sale, we must find that the agents' "continued inducement" of him to arrange sale after sale entrapped him. True, the agents expressed dissatisfaction with the product supplied by Valle and Malfi, and they insisted that Santore take them to his New York connection. However, in view of defendant's apparent ready willingness to find new suppliers, and arrange new sales, we cannot say that that inducement constituted entrapment. We think the test to be applied to these subsequent relations is the same test that governs an initial contact between a government agent and a suspected crimi-

nal. The public policy which, within limits, permits government agents to practice the art of deception is not dissipated when one member of a criminal group has been discovered and discovery of the others through that contact is desired.

III The Legality of the Search of Lorenzo Orlando's Home

The defendant Lorenzo Orlando moved the district court to suppress all the evidence found by the agents during their search of his attic apartment and basement on January 23, 1958. He alleged that the search warrant under which the agents gained admission was illegal and that consequently the narcotics, equipment, etc. were the fruits of an illegal search and seizure. The district court denied this motion, and defendant assigns that denial as error on this appeal.

There most assuredly was probable cause for the issuance of the warrant. Twice the agents observed that shortly after a light went on in the second floor of the house at 164 Hill Street a package, subsequently found to contain narcotics, was carried out. The warrant stated that the applicant for the warrant had reason to believe that illegal narcotics were to be found "on the premises known as 164 Hill Street, Elmont, Long Island, New York, being a one family house, in the Eastern District of New York." However, it is defendant's contention that since the house was not a one-family house, but two-family, the basement and second floor being occupied by Orlando and his wife and the first floor by a family named Drago, the warrant did not describe the place to be searched with that particularity required by the Fourth Amendment. While there might be merit to this position were we dealing with the case of an ordinary multiple dwelling building, see *United States* v. *Hinton*, 219 F. 2d 324 (7 Cir. 1955), we think that under

the circumstances here the district court's ruling must be upheld.

The house at 164 Hill Street is to all outward appearances a one-family house with a front door and a side door, and it had always been registered with the local authorities as a one-family dwelling. A few years prior to the search the interior of the house was renovated and subdivided by Orlando, but, in contravention of local ordinances, no permission to do so was obtained from the proper authorities. Consequently no notice of this subdivision was ever given to the local officials.

In view of these facts we think that the issued warrant described the premises to be searched with that "practical accuracy" we have held to be necessary. *United States* v. *Fitzmaurice*, 45 F. 2d 133 (2 Cir. 1930). The description in the warrant was in accordance with the outward appearance of the structure, cf. *Carney* v. *United States*, 79 F. 2d 821 (6 Cir. 1935), and in view of the concealment by Orlando of the interior alteration made by him it would be absurd to say that the Government was on notice as to it. The agents were not warned of a possible dual occupancy of the house until after they had shown the copy of the warrant to Orlando and had entered inside. At that moment it was too late for them, consistent with the success of their mission, to have retreated and obtained a new warrant.

IV The Grand Jury Minutes

The defendants also seek a new trial on the ground that the district court committed reversible error in its rulings with respect to the grand jury testimony of government witnesses. In the court below the defendants requested that the grand jury minutes be given them directly under *Jencks* v. *United States*, 353 U. S. 657 (1957), and 18

U. S. C. §3500; or that, at the very least, the district judge read the minutes to determine whether there were any consistencies between the testimony the witnesses gave before the grand jury and that adduced at the trial. Both of these requests were refused.

We have previously held that neither *Jencks* nor 18 U. S. C. §3500 apply to grand jury minutes, *United States* v. *Spangelet*, 258 F. 2d 338 (2 Cir. 1958); *United States* v. *Angelet*, 255 F. 2d 383 (2 Cir. 1958); and the Supreme Court has recently expressed its agreement with this approach, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 (1959). Accordingly defendants' first request was quite properly denied. However, defendants' second request appears to be in accord with the position we took in *Spangelet*. There we said:

> "The district judge held that neither Jencks nor the statute enacted by Congress immediately after the Jencks decision, 18 U. S. C. A. §3500, authorized handing over grand jury testimony to defendant's counsel. The judge thereopon utilized the procedure which had prevailed before the Jencks case and inspected the grand jury testimony *in camera*. Finding no inconsistencies he then refused to give the transcript to the defense.
>
> "We hold that the district judge followed the proper procedure with respect to grand jury minutes." 258 F. 2d at 339.

In accord with our holding in *Spangelet*, therefore, we issued an order to the trial judge requiring him to read the grand jury minutes and to certify to this court whether, in his judgment, there were inconsistencies in the testimony of witnesses who testified both before the grand jury and at trial to warrant turning over to the defendants those portions of the grand jury minutes in which the in-

consistencies appeared; and, if there were such inconsistencies, whether in his judgment the failure to turn over those portions of the minutes containing them prejudiced the defense. In compliance with this order the trial judge certified that:

> "[A]ny inconsistencies that exist between the testimony of those witnesses who testified both before the Grand Jury and at the trial are of such a minor nature that I would not have ordered that they be delivered to defense counsel. I further certify that in my judgment the defense was in no way prejudiced by my refusal to order that they be surrendered to them."

We have reviewed both the trial transcript and the grand jury minutes, and we are in agreement with this certification. Accordingly, we hold that while the district court did not comply with the defendants' several requests that the grand jury minutes be turned over to defense counsel, and did not examine those minutes *in camera* during the trial in accord with the practice we approved in *Spangelet*, the defendants are not entitled to new trials. If the trial judge had read the grand jury minutes when requested to do so he would have ruled that the defendants could not examine them. In the present state of the law, this case not having been a jury case, we hold that this compliance with *Spangelet* by the trier of both law and facts is all the defendants are entitled to.

V Miscellaneous Points

The remaining points raised by defendants do not require extended discussion, and will be dealt with briefly. The first of these is the contention that the Government's proof revealed a prejudicial variance in that it showed the existence of multiple conspiracies rather than the one conspiracy that was charged in the indictment. Citing *Kot-*

teakos v. *United States*, 328 U. S. 750 (1946), defendants urge reversal on this ground. We do not agree that the proof presented revealed the existence of more than one conspiracy. For as we said in *United States* v. *Rich*, 262 F. 2d 415 (2 Cir. 1959):

> "The courts have [held] that persons can be involved in a conspiracy even though they do not know all the other members of the conspiracy or participate in each phase. Recognition is thus given to reality, namely, that there must of necessity be a division of labor and function by those engaged in this business. If there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy."

And see *Poliafico* v. *United States*, 237 F. 2d 97 (6 Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957), *rehearing denied*, 353 U. S. 931 (1957); *United States* v. *Tramaglino*, 197 F. 2d 928 (2 Cir. 1952); *cert. denied*, 344 U. S. 864 (1932); *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir. 1939), *reversed on other grounds*, 308 U. S. 297 (1939). But even if we thought otherwise, the doctrine of Kotteakos would be inapplicable here. In that case the evidence showed the existence of at least eight separate conspiracies, and the court's decision was predicated upon possible confusion in the minds of the jurors. Here, trial was to the court without jury, there were at most only two separate groups of coconspirators, and the district judge was not confused as to the situation. In pronouncing judgment on the defendants he said:

> "I hold that all of the defendants were involved in one conspiracy. In view of the kind of operation and the nature of the product within this conspiracy, I

feel that the case of United States v. Bruno, 105 Fed. 2d 921, provides a guide. Thus it is not necessary that each defendant know the others or the existence of the others in the conspiracy, that knowledge being implied from the size and the character of the conspiracy. But if two separate conspiracies should be vaguely found or inferred, one involving Narducci, Tarlentino, Ignazio Lawrence Orlando, Lorenzo Orlando, Joseph Lo Piccolo, plus the two fugitives, and the other consisting of Ignazio Lawrence Orlando, Joseph Lo Piccolo, Lorenzo Orlando, Peter Casella, James Santore, James Leo Massi and Emilio D'Aria, it is my finding that the evidence against these defendants is sufficient to find them guilty, considering against each only the statements of the conspirators involved and the evidence adduced by the Government as to such conspirators."

The defendants Lorenzo Orlando, D'Aria and Massi argue that the district judge committed error when he denied a motion for a mistrial made after the trial was temporarily postponed at a time when the two Orlandos were taken to the Eastern District of New York and there adjudged guilty on a charge of possession of the narcotics discovered in Lorenzo Orlando's home. The basis of this contention, as we understand it, is that since this postponement occurred on July 3, the day the trial ended and judgment was to be pronounced, it was so likely that the district judge's decision would be influenced by the judgment rendered in the Eastern District that he should have had the trial begin anew. We cannot agree. There was substantial evidence against each of the Orlandos. And the district judge expressly noted that he was in no way concerned with the decision in the Eastern District but had resolved the issues before him on the basis of the evidence presented in his own court. We must credit our

federal trial judges with more independence of judgment than this argument suggests.

The defendant, Casella contends that the trial judge maintained a prejudicial attitude toward the defendants, and that this attitude, expressed in various comments, deprived them of a fair trial. However, when the remarks are looked at in context they do not support this contention, and we have not found other indications of such an attitude on the part of the trial judge. On the contrary, it is our considered judgment that he conducted a long and difficult trial in a fair and proper manner.

Joseph Lo Piccolo rested his case at the end of the Government's case. He argues that the district court committed reversible error as to him because it ruled that, though he put in no evidence in support of his cause, evidence damaging to him elicited from defense witnesses called by the other defendants would be binding upon him. We need not pass upon the merits of this contention for, in announcing its decision with respect to those defendants who presented no evidence in their own behalf, the court stated that it found them guilty on the basis of the Government's proof alone. Our study and analysis of the evidence demonstrate to us the accuracy of this observation.

Casella and Santore make various contentions with respect to their sentences. Casella argues that he was but an aider and abettor, the conspiracy charge was in his case simply an alternative form of charging the substantive offenses, and therefore the imposition of a separate consecutive sentence on the conspiracy count was improper. But this too is an argument with which we need not deal. Casella was sentenced to terms of twenty years on each of Counts One and Two to run concurrently with each other; and twenty years each on Count Three and Count Five to run concurrently with each other, but consecutively

to the serving of the sentences on Counts One and Two. Thus Casella's argument overlooks the fact that one of the terms of imprisonment ordered to run consecutively embraces a substantive count and that the sentence on the conspiracy count runs concurrently with that term.

Santore argues that all of the various sales of narcotics in which he participated in Pennsylvania, New Jersey and New York constituted a single continuous transaction, and that it was improper for the district court to have ordered the twenty year sentence imposed upon him to run consecutively to the sentences imposed in Pennsylvania and New Jersey for the violations committed in those states. But while these sales may have all been part of one overall continuous transaction, they were each a crime punishable separately under 21 U. S. C. §174. And it is well settled that a court may provide for a sentence to begin at the expiration of one then being served. *Ponzi* v. *Fessenden*, 258 U. S. 254, 265 (1922); *Wall* v. *Hudspeth*, 108 F. 2d 865 (10 Cir. 1940); *Carrol* v. *Zerbst*, 76 F. 2d 961 (10 Cir. 1935); *Ex Parte Lemar*, 274 Fed. 160, 176-77 (2 Cir. 1921), *aff'd*, 260 U. S. 711 (1923); *United States* v. *Wright*, 56 F. Supp. 489 (E. D. Ill. 1944).

Defendants Santore, Orlando, Tarlentino and Narducci were represented on appeal by The Legal Aid Society, Thomas Shaw of counsel for Santore and Orlando, and Stewart Johnson of counsel for Tarlentino and Narducci. We express our gratitude to these lawyers who, in volunteering their services to assist impecunious defendants, not only render invaluable aid to the court but exemplify standards of high professional responsibility.

We unanimously affirm the convictions of Peter Casella and of Lorenzo Orlando; and of James Santore upon Counts One, Three and Five, and of Joseph Lo Piccolo on Count Five. We affirm the convictions of Emilio D'Aria

and James Leo Massi, Judge Hand dissenting. We reverse the convictions of Anthony Edward Tarlentino and Nicholas Narducci, and the convictions of James Santore and Joseph Paul Lo Piccolo on Count Two, Judge Byers dissenting.

HAND, *Circuit Judge* (dissenting as to D'Aria and Massi):

I agree with the opinion of Judge Waterman with one exception, i.e., I do not think that "possession" in the last paragraph of Sec. 174 of Title 21, U. S. Code, includes "constructive possession." I understand by "possession," as that term is commonly used in the law, either actual custody of the chattel, or at least that relation to the custodian that makes him unconditionally subject to the "possessors" demand for custody. I am of course aware that the outlines of the conception are not sharply drawn, but it seems to me that D'Aria and Massi did not have "possession" in the sense required. In the case at bar by adding "constructive possession" we give very important added advantage procedurally to the case for the prosecution, which it seems to me is unwarranted for reasons I shall try to state.

The paragraph in question creates more than a "presumption" for that would require no more than that the accused should put in some evidence that he had not dealt with the drugs in any of the ways forbidden. As I read the paragraph, "possession" by itself will support a conviction unless the accused "explains the possession to the satisfaction of the jury," which in the end comes to saying that the burden of proof shifts to him to establish his innocence, once he is shown, not only to be in "possession" at the time of the forbidden dealings, but to have ever been in possession in the past. Assuming that such a statute

would be constitutional, which, I submit, is not wholly free from doubt, it appears to me that at least the language should be explicit that "possession" has some other than the usual meaning. We must remember further that, not only is this a criminal statute, but that the penalties prescribed are extremely heavy.

Moreover, I find confirmation for my interpretation in the fact that when in 1914, five years later, Congress made dealing in narcotics lawful under specified conditions, among which was the "registry" of the dealers (Sec. 4722, Title 26, U. S. Code), it provided that "possession or control" should be presumed to be a violation of that act (Sec. 4724c, Title 26, U. S. Code), unless the dealer had "registered"; it did not shift the burden of proof. It is therefore clear that in that statute at least "possession" was used in its ordinary sense, and that, when Congress meant to include "constructive possession," it added the phrase, "or control."

I agree that it does not necessarily follow that in 1909 the word may not have been used more comprehensively; but I submit that it is significant that, when dealing with the same subject matter—narcotic drugs—the same word was used so as to exclude "constructive possession." Moreover, Sec. 4734 of Title 26 provides that Sec. 4722—among other sections—shall not "impair, alter, amend or repeal" any part of the Act of 1914. I agree that this language means that whatever was "possession" under Sec. 174 remains "possession" under the Act of 1914, but, I cannot see how that helps to define what was "possession" under Sec. 174. Not only does it beg the question to assume that the word had the same meaning in both statutes, but it makes redundant the addition of the words, "or in control," in 1914. I can see no reason to imply that these were added merely to make assurance doubly sure. As I have said, the Act of 1909 imposed much heavier penalties, and

procedural consequences of the "possession" were more drastic.

It is true that we have twice spoken as though "constructive possession" was enough under Sec. 174 (*United States* v. *Cohen*, 124 Fed. (2) 164, *United States* v. *Moia*, 251 Fed. (2) 255); but in both cases, "possession," *stricti juris*, was proved and what we said was *obiter*. On the other hand in *United States* v. *Landry*, 257 Fed. (2) 425 (1958) the Seventh Circuit decided that control by the accused over the custodian of narcotics was not alone enough to put the accused in "possession" under Sec. 174. In that case the control was more immediate than that of D'Aria and Massi in the case at bar. The point appears to me therefore to be still open for discussion.

To sum up I do not say that it would be unconstitutional to make "possession or control" enough to shift the burden of proof; but, I do think that if the intent was so far reaching, it was necessary to be more explicit as was done in the Act of 1914.

BYERS, *District Judge* (concurring in part, and dissenting in part):

The travail of this adjudication has wrought a diversity of opinion in the court as to correct disposition of the appeal of certain of the defendants; as a result it seems to be requisite that the views of each component of the court be made a matter of record.

I concur in the affirmance of the convictions of Casella, D'Aria, Massi and Orlando.

I concur in the conviction of Santore on counts One, Three and Five, and dissent from the reversal of his conviction on count Two, and would affirm as to that.

I concur in the conviction of Lo Piccolo on count Five, and dissent from the reversal as to him on count Two, and would affirm.

I dissent from the reversal of the convictions of Narducci and Tarlentino.

The reasons upon which the foregoing are based can be briefly stated:

At the outset it is to be remembered that this court is unanimous in holding that there was one conspiracy as charged in the indictment, and that all of these defendants were parties to it. The analogy to a partnership is of course not complete, but that terminology is deemed to be sufficiently apt to indicate the true relationship of defendants one to the other.

Since the agreement which the law perceives under such circumstances becomes visible in the acts of those who carry it into effect, the precise roles assigned to each are seldom if ever entirely revealed.

This means that it is an overambitious task to spell out to a nicety the exact allocation of duties of each individual in the performance of the joint task. It may be doubted if the inner workings of such a conspiracy are strictly organized. Probably individual performance is improvised on consent, according to the exigencies attending the delivery of a given package of the contraband.

If the foregoing betrays a reasonably correct understanding of such operations as this court is now dealing with, it would seem to follow that the conspiracy itself is the basic element of the picture as a whole, and once that has been found to be present, such details as "constructive possession" as opposed to manual possession, are of unimportant significance.

It is with true deference that I venture to suggest that Judge Hand's conception of "possession" as meaning "either actual custody of the chattel, or at least that relation to the custodian that makes him unconditionally subject to the 'possessor's' demand for custody" is not dispositive in dealing with the members of such a criminal conspiracy as this.

In such a matter it seems to me that it is each individual's relation to the contraband (not to one who may be temporarily its custodian) upon which the issue of possession turns. Since the contraband is in the joint custody of all, and since it may pass from hand to hand within the group—and probably does—as circumstances may dictate, the prosecution should not be called upon to prove who it was at a given instant of time that possessed any capacity to make the demand referred to in the foregoing quotation.

The enforcing authorities ought not to be required at all times to be adept at reading the details of what is by its very nature, a thimblerig enterprise.

Once such a joint and coordinated activity has been disclosed, as it was in this case, the later developments must be judged in the light of the partnership relationship so established, because as the law sees it, the conspiracy is not obliterated by the substantive offenses. It seems that the partnership relation, not that of principal and agent, points the path to decision.

That is in outline the premise from which the conclusions hereinabove stated are reached.

SANTORE.

This dissent has to do with the reversal as to count Two, the sale of December 11, 1957 which was accomplished through the placing of 16 ounces 390 grains of heroin in a

bureau drawer in the agents' room at the Hotel Edison. To quote from Judge Waterman's careful recital of the facts, Casella had visited Lo Piccolo's apartment where the contraband had been cached:

> "Upon his (Casella's) return to the hotel where Santore, Marshall (agent) and Picini (agent) were waiting he said that the drugs would be delivered that evening at 9:00 P.M. *It was agreed* (emphasis supplied) that the drugs were to be placed in a bureau drawer in the agents' room at the Hotel Edison while they were absent from it."

Again:

> "No one had gone into the agents' room except Ignazio Orlando. When the agents looked in the bureau they found a package containing a half-kilo of heroin. Picini then, at Casella's direction, gave $6,000.00 to Santore."

To me, the above recited agreement to which Santore was evidently a party, and the finding of his membership in the conspiracy, plus the payment to him of $6,000.00, made him an active and controlling participant in the elaborately concealed delivery.

He had sufficient control over that movement to collect the proceeds upon its successful completion. In other words, he was of managerial status in the enterprise, and should be so dealt with.

LO PICCOLO.

Again there is a reversal as to count Two (the said sale of December 11, 1957).

This was the subject of a conversation on the previous evening; the said agents and Santore and Casella, while

dining, were discussing a purchase of heroin. Lo Piccolo entered the restaurant, and Casella joined him but apart from the others. After those two talked, Casella returned to the group and stated that all desired arrangements had been made.

The court's opinion contains the following:

> "Despite his vehement protestations to the contrary, there is no doubt in our minds that the government established his participation in that sale (Dec. 11, 1957) and that he was a member of the peddling conspiracy."

Despite the foregoing, the opinion later says: that there was no evidence that Lo Piccolo ever possessed heroin as early as December 11, 1957, physically, or by controlling the disposition of it, or otherwise.

It seems to me that the foregoing is inconsistent with the evidence. The heroin is shown to have been removed from Lo Piccolo's apartment by young Orlando. Casella did not report to the agents on December 11 that the heroin would be delivered at the agents' room as has been stated, until he had visited the apartment building where Lo Piccolo lived. If Lo Piccolo did not have custody and control over his own apartment, it is to be supposed that he would have submitted testimony to that effect. Of course the version that young Orlando would have given, touching his removal of the contraband from Lo Piccolo's apartment and delivery to the agents' room, has not been revealed, but in my opinion it was not needed.

Lo Piccolo's place in the conspiracy having been shown, it matters not whether he secreted the heroin as shown, of his own volition, or because Casella told him to. While it was in his apartment, he had sufficient possession of it to enable him to summon the authorities to relieve him of it,

or otherwise dispose of it so as to frustrate the purpose of his talk on the previous evening with Casella. Of course he did neither.

It is required of a trial judge that he be fair and impartial, but not that he be feeble-minded.

I think Judge Noonan was right in convicting Lo Piccolo on this count, and therefore I would affirm.

TARLENTINO AND NARDUCCI.

This court reverses as to counts Four and Five. The former charges these defendants with possession on January 21, 1958 of over six pounds of heroin, and with the conspiracy as charged in count Five.

As to the latter, this court finds these defendants to have been guilty, but nonetheless reverses their conviction. I can imagine no more triumphant *non-sequitur*.

In dealing with count Four, it is to be remembered that the said package of heroin was found in Napolitano's (not a defendant named) car on January 21, 1958. The facts show that on the previous evening these defendants drove to the place where Napolitano's car (in which the package had been placed) was parked; Tarlentino remained in the car in which they arrived while Narducci went to that of Napolitano, opened the trunk, lifted the package, and while in the act of so doing became aware of the presence of certain agents, dropped the package back into the trunk, and rejoined Tarlentino.

Thus the character and contents of the package have been shown, and the conduct of these two defendants in seeking to further its delivery is clearly revealed. Since it is familiar law that success need not attend the object of a conspiracy in order to establish its existence, I fail to see how the reversal as to the Fifth count can be justified.

The court's opinion states that "there was no evidence whatsoever to indicate that they had knowledge that the drugs in the package were contraband, and because we are not able to say from the record that they were ever in possession, actual or constructive, of that package . . . ."

As to the possession, there was a joint effort to further delivery, by the approach to Napolitano's car. If they had not known what was in its trunk, the errand was of no apparent purpose. The grasping of the package by Nardinci was either with knowledge of its character, or in ignorance of it. There is no middle ground. That temporary possession was surrendered, but for a brief period of time it existed. The replacement of the package was consistent only with a purpose of concealment, and otherwise would not have been resorted to.

This circumstantial evidence was not consistent with innocence in any degree that is perceptible to me.

Thus as to these defendants I would affirm as to both counts.

In sum, it seems to the writer that the case comes before this court clothed with the usual immunity from reversal in the absence of a showing that the decision of the trial judge was clearly erroneous. To my mind it was clearly correct, and should be affirmed in its entirety.